(13)

No. 00-1853-CFX Title: Akos Swierkiewicz, Petitioner
v.
Sorema N.A.

Docketed: June 13, 2001 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Jun 8 2001	Petition for writ of certiorari filed. (Response due August 13, 2001)
	Jun 28 2001	Order extending time to file response to petition until August 13, 2001.
	Aug 13 2001	Brief of respondent Sorema N.A. in opposition filed.
	Aug 29 2001	DISTRIBUTED for Conference of September 24, 2001
	Sep 25 2001	Petition GRANTED. SET FOR ARGUMENT January 15, 2002. **********
	Nov 2 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including November 16, 2001.
	Nov 16 2001	Brief amicus curiae of Equal Employment Opportunity Commission filed.
	Nov 16 2001	Motion of NAACP Legal Defense and Educational Fund, Inc. for leave to file a brief as amicus curiae filed.
	Nov 16 2001	Joint appendix filed.
	Nov 16 2001	Brief of petitioner Akos Swierkiewicz filed.
	Nov 16 2001	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
	Nov 16 2001	Brief amicus curiae of National Employment Lawyers' Association, et al. (TBP), filed.
	Nov 21 2001	Order extending time to file respondent's brief on the merits to and including December 21, 2001.
	Nov 26 2001	CIRCULATED.
	Nov 29 2001	Record filed.
	Dec 3 2001	Motion of NAACP Legal Defense and Educational Fund, Inc. for leave to file a brief as amicus curiae GRANTED.
	Dec 5 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 5 2001	Record filed.
	Dec 21 2001	Brief of respondent Sorema N.A. filed.
	Dec 21 2001	Brief amicus curiae of Equal Employment Advisory Council filed.
	Dec 21 2001	Brief amicus curiae of Center for Individual Freedom filed.
	Jan 4 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 8 2002	Reply brief of petitioner Akos Swierkiewicz (TBP) filed.
	Jan 15 2002	ARGUED.

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Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

versus

SOREMA N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must an employment discrimination plaintiff do more in his complaint than put his employer on notice of his discrimination claims, i.e., must he also plead specific facts showing that at trial he can make out a *prima facie* case of discrimination under *McDonnell Douglas v. Green*?

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F.R.C.P. Rule 12(b)(6) 2, 7, 8, 11

Akos Swierkiewicz respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the order of the United States District Court for the Southern District of New York dismissing his amended complaint for failure to state a claim upon which relief can be granted.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is reproduced in the Appendix at App. 1a - 4a. The opinion of the District Court is also unreported. It is reproduced in the Appendix at App. 5a - 9a.

JURISDICTION

The Court of Appeals entered its judgment on March 13, 2001. App. at 1a. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides in relevant part: "A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move for the dismissal of a pleading for "failure to state a claim upon which relief can be granted."

STATEMENT OF THE CASE

Fired from his job, petitioner, Akos Swierkiewicz, sued his former employer, respondent, Sorema N.A. ("Sorema"), on claims of national origin and age discrimination. His national origin claim was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*("Title VII"); his age discrimination claim was based on the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA").

A. Course of Proceedings Below

The complaint was originally filed in the United States District Court for the Eastern District of Pennsylvania where Mr. Swierkiewicz resided. On Sorema's motion, the action was transferred to the United States District Court for the Southern District of New York where Sorema is headquartered.

After the action was transferred, Mr. Swierkiewicz amended his complaint as of course to challenge his dismissal on parallel grounds of national origin and age discrimination based on Sorema's violations of New York State and City law. Jurisdiction over these supplemental claims was conferred on the district court by 28 U.S.C. § 1367(a). Sorema then moved to dismiss the amended complaint on the ground that it "failed to state a *prima facie*

case of discrimination based on national origin or age." In support of its motion, Sorema submitted an affidavit from its trial counsel that contained uncorroborated hearsay allegations that went well beyond the four corners of the amended complaint. Mr. Swierkiewicz opposed the motion and objected to the improper allegations in defense counsel's affidavit.[1]

After hearing oral argument, the district court granted Sorema's motion and dismissed the amended complaint with prejudice. App. at 5a - 10a.[2] Analyzing the

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[1]The affidavit essentially rewrote the amended complaint so that it could be read in the light most favorable to Sorema. For example, while the amended complaint alleged that Mr. Swierkiewicz was demoted in 1995 on account of his national origin and age, *id.* at ¶ 20, the affidavit asserted there was no demotion, but rather, "a reorganization occurred at Sorema which resulted in changes in Swierkiewicz's job responsibilities." Aff. at ¶ 3 (emphasis added). Moreover, while the amended complaint alleged that after two years of discrimination following his demotion, Mr. Swierkiewicz sent a memo to Sorema's CEO outlining his grievances and requesting a severance package to resolve them, *id.* at ¶ 31, defense counsel's affidavit asserted that he wrote the memo because "he was unhappy with his job and intended to leave the company . . ." Aff. at ¶ 4. Finally, while the amended complaint alleged that, after receiving the memo, Sorema's CEO gave Mr. Swierkiewicz two options -- quit without a severance package or be fired -- and that he was fired because he refused to quit, *id.* at ¶¶ 33-35, defense counsel's affidavit asserted he was fired because he "went to his office and cleared out all of his personal belongings [and then] refused to resign because Sorema did not grant him the severance he demanded." Aff. at ¶¶ 4-5. None of defense counsel's hearsay assertions can be squared with the allegations of the amended complaint nor can they be reasonably inferred from those allegations.

[2]In its ruling, the district court stated that it did not rely on the uncorroborated hearsay allegations contained in the affidavit of defense counsel. App. at 5a. Sorema, nonetheless, insisted that the full affidavit be included in the Joint Appendix filed in the Second Circuit. It then proceeded to rely on the affidavit's hearsay allegations in its brief in support of affirmance.

case under the rubric of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it held that Mr. Swierkiewicz had adequately pled membership in a protected class, was qualified to perform his job and (it assumed **arguendo**) had suffered an adverse employment action. App. at 6a. Nonetheless, despite five paragraphs in the amended complaint explicitly averring that Mr. Swierkiewicz was fired by Sorema on account of his national origin and age (*id.* at ¶¶ 37, 43, 45, 47 and 49), the district court concluded he had "not adequately alleged a *prima facie* case . . . [to] support an inference of discrimination." App. at 9a. Having dismissed Mr. Swierkiewicz's Title VII and ADEA claims on that basis, the district court then dismissed his pendent State and City law claims because "no additional facts" had been pled that would "cure the deficiencies in the federal claim[s]." *Id.*

Mr. Swierkiewicz appealed the dismissal of his action to the Second Circuit. Citing Rule 8(a)(2) of the Federal Rules of Civil Procedure, caselaw from this Court and from five circuit courts of appeals, he contended that, at the pleadings stage, his amended complaint should have been analyzed solely to determine if he had adequately put Sorema on notice of his discrimination claims -- and not whether he could make out at trial a *prima facie* case of discrimination under *McDonnell Douglas v. Green*. Notwithstanding his argument, the Second Circuit affirmed the district court. It too analyzed the amended complaint under *McDonnell Douglas v. Green* and, having done so, it dismissed Mr. Swierkiewicz's allegations as "conclusory" and "insufficient as a matter of law to raise an inference of discrimination." App. at 3a and 4a.

B. Statement of Facts

The facts as drawn from the nine page amended complaint are as follows: Sorema is a French owned and controlled reinsurance company. Mr. Swierkiewicz, who is of Hungarian descent, was hired by Sorema in April 1989 as a Senior Vice President and Chief Underwriting Officer ("CUO"). He was 43 years old at the time. In February 1995, Francois Chavel, a French national and Sorema's Chief Executive Officer, demoted Mr. Swierkiewicz and transferred the bulk of his CUO duties to another French national, Nicholas Papadopoulo. Mr. Papadopoulo was 32 years old at the time -- 16 years younger and far less qualified for the job than Mr. Swierkiewicz. A year later, Mr. Chavel formally promoted Mr. Papadopoulo to the CUO position. Mr. Swierkiewicz's demotion and subsequent assignment to a marketing and services position had nothing at all to do with his performance. To the contrary, Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin and his age.[3]

Over the course of the next two years, Mr. Chavel continued to discriminate against Mr. Swierkiewicz on account of his national origin and age. He did so by isolating him, excluding him from business decisions and meetings, and denying him any opportunity for career growth. On the other hand, Mr. Chavel hired and promoted other French nationals and substantially younger employees

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[3]At the time of the demotion (which the Second Circuit erroneously characterized as a "shift [ ] . . . in job responsibilities", App. at 2a, a characterization nowhere to be found in the amended complaint, but which was likely drawn from the hearsay allegations in defense counsel's affidavit, *id.* at ¶ 3), Mr. Chavel stated he took the action in order to "energize" the underwriting department -- a clear indication that he considered Mr. Swierkiewicz too old for the CUO job. Amended Complaint at ¶ 23.

to perform jobs for which Mr. Swierkiewicz was more experienced and qualified to perform.

Mr. Swierkiewicz tried to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subject, but his efforts were unavailing. Finally, on April 14, 1997, after two years of ongoing discrimination, Mr. Swierkiewicz sent Mr. Chavel a memo outlining his grievances and requesting a severance package from Sorema. Mr. Chavel did not respond to the memo. Fifteen days later, on April 29, 1997, Mr. Chavel and Sorema's General Counsel met with Mr. Swierkiewicz and gave him an ultimatum: either resign without a severance package or be fired. Mr. Swierkiewicz refused to resign; whereupon, Mr. Chavel fired him effective that very day. There was no valid basis for the termination; it was, rather, motivated by Mr. Swierkiewicz's national origin and age (he was 50 at the time). Moreover, unlike other Sorema executives who were fired for cause and who nonetheless received generous severance packages from the company, Mr. Swierkiewicz, who was not fired for cause (his performance had always been above reproach), was denied severance pay and benefits by Sorema. This too was motivated by his national origin and age.

REASON FOR GRANTING THE WRIT

I. The Second Circuit's Decision Conflicts with Binding Precedent of This Court

The Second Circuit misconceived both its role and the applicable standard of review in affirming the dismissal of Mr. Swierkiewicz's amended complaint. Its role was "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

To answer that question, the Second Circuit (and the District Court before it) was required to determine whether Mr. Swierkiewicz's amended complaint stated "a claim upon which relief can be granted." Rule 12(b)(6), F.R.Civ.P. 'Ever since 1938, that has meant that a plaintiff has the duty -- but no more than this is required -- to put the defendant on notice of the nature of his action. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Fact pleading, a pre-1938 feature of code practice, has long since been abandoned in favor of post-complaint "discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47-48.

Employment discrimination and other civil rights claims are not exceptions to the notice pleading requirements of the Federal Rules. Indeed, *Conley* itself was a class action by African-American railroad clerks who claimed their union had breached its duty of fair representation and discriminated against them in violation of the Railway Labor Act, 45 U.S.C. § *151 et seq.* In

reversing the Rule 12(b)(6) dismissal of their complaint, this Court rejected the union's argument that the complaint was insufficiently fact-specific, stating:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

355 U.S. at 47 (footnote omitted).

Seventeen years later, in *Scheuer*, another civil rights action, the Court again cautioned lower federal courts against the too hasty dismissal of complaints based on their preliminary sense that recovery was "very remote." 416 U.S. at 236. Remoteness of recovery, the Court said, "is not the test." *Id.* Rather, "the complaint should be construed favorably to the pleader," *id.*, and allowed to proceed through discovery and then through summary judgment or trial. *Id.* at 250. Dismissal for failure to state a claim should only occur when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Id.* at 236, **quoting** *Conley*, 355 U.S. at 45-46.

Despite the holdings in *Conley* and *Scheuer*, a number of lower federal courts continued to hold civil rights plaintiffs to a higher pleading standard than otherwise required by Rule 8(a)(2). In 1993, the Court held that any such heightened pleading requirement was improper. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). "We think that it

> is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

Here, instead of deferring to the principle of notice pleading, the Second Circuit chastised Mr. Swierkiewicz for his "conclusory" allegations, App. at 3a, which, it held, were insufficient to "raise an inference of [national origin and age] discrimination." *Id.* at 3a-4a. The District Court also rebuked Mr. Swierkiewicz for the same alleged defects. *Id.* at 7a (dismissing the amended complaint for alleging "in a conclusory fashion that he was terminated as a result of his age and national origin."). These rulings were clearly improper. Five times in his amended complaint, Mr. Swierkiewicz pled that he was fired by Sorema on account of his national origin and his age. *Id.* at ¶ ¶ 37, 43, 45, 47 and 49. Under the notice pleading practice of the Federal Rules, that was sufficient to take his case past the pleadings stage and on to either summary judgment or trial. *Accord Scheuer v. Rhodes*, 416 U.S. at 250.[4]

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[4]Even if more were required by the Federal Rules than mere notice pleading, there clearly were sufficient facts pled in the amended complaint to satisfy the Second Circuit's heightened pleading requirement. These included: averments that Mr. Chavel demoted Mr. Swierkiewicz in 1995 in favor of a substantially younger and less qualified French national; two years of continuous discrimination against Mr. Swierkiewicz following his demotion; the preferences shown by Sorema for substantially younger French nationals; the sudden and unjustified firing of Mr. Swierkiewicz after he protested the unsatisfactory working conditions to which he had been subject; and the favorable severance packages that Sorema provided to other executives who, unlike Mr. Swierkiewicz, were fired by Sorema for cause. Put in this context, and reading the amended complaint in the light most favorable to Mr. Swierkiewicz, the Second Circuit clearly erred in affirming the dismissal of his lawsuit.

II. The Second Circuit's Decision Conflicts With Precedent From Five Other Courts of Appeals

Among the circuit courts, only the Second Circuit has held that an employment discrimination plaintiff must plead the elements of a *McDonnell Douglas prima facie* case to withstand a defense motion to dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The five other courts of appeals that have considered the subject -- the District of Columbia, the Third, Seventh, Eighth and Ninth Circuits -- have all held that the *McDonnell Douglas* regimen is an evidentiary standard to be used at the summary judgment or trial stage of a discrimination case -- not one to be used at the pleadings stage to assess whether a discrimination complaint passes muster under the practice of notice pleading established by Rule 8(a)(2) of the Federal Rules of Civil Procedure. *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) ("Sparrow did not have to make out a *prima facie* case of discrimination in his complaint"); *Weston v. Commonwealth of Pennsylvania*, 2001 U.S.App. LEXIS 10514 at *22 (3d Cir. 2001) (eschewing any requirement of fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint need not set out the elements of a *prima facie* case: "I was turned down for a job because of my race is all a complaint has to say")(internal quotations omitted); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993)("the *prima facie* case . . . analysis is an evidentiary standard -- it defines the question of *proof* plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a

claim")(emphasis in original); and *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) ("A plaintiff need not make a *prima facie* showing to survive a motion to dismiss provided he otherwise sets forth a short and plain statement of his claim showing he is entitled to relief.").[5]

What separates the Second Circuit from these five Circuits is a fundamental difference of opinion between notice and fact pleading. But that divide was crossed in 1938 when the Federal Rules of Civil Procedure were adopted. Since then, save for the Second Circuit, the rule has been that notice pleading is all that is required in a complaint. The rest is left for discovery, summary judgment or trial. "Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of a party's proof leads to windy complaints and defeats the function of Rule 8." *Bennett v. Schmidt*, 153 F.3d at 519 (emphasis in original). The Second Circuit's contrary view, requiring a discrimination complaint to include the elements of a *McDonnell Douglas prima facie* case, constitutes an inter-circuit conflict that warrants review and resolution by this Court.[6]

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[5]The Court's decision last term in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) confirms, albeit implicitly, that *McDonnell Douglas* was intended as a means (though not the only means) for assessing whether a plaintiff has enough evidence to take his case to a verdict at trial -- not whether he has pled enough to withstand his employer's Rule 12(b)(6) motion to dismiss.

[6]Ironically, more than fifty years ago the Second Circuit held that complaints should not be dismissed for being insufficiently fact-specific. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). There, it stated:

> Under the new rules of civil procedure there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be "a

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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short and plain statement of the claim showing that the pleader is entitled to relief."

Id. at 775. *Dioguardi*, it should be pointed out, was cited with approval by this Court in *Conley*, 355 U.S. at 46 n.5. However, beginning in the 1970's, the Second Circuit began demanding more than mere notice pleading from employment discrimination plaintiffs, opting instead for the kind of fact-pleading that characterized pre-1938 code practice. *See, e.g., Martin v. New York State Dept. of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978) (motion to dismiss granted because plaintiff "has alleged only that he was denied the perquisites of his position because of his race.")(emphasis added).

(any footnotes trail end of each document)
No. 00-9010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AKOS SWIERKIEWICZ,
Plaintiff-Appellant,

v.

SOREMA, N.A.,
Defendant-Appellee.

March 12, 2001, Decided

COUNSEL:
APPEARING FOR APPELLANT: LAUREN REITER BRODY, Esq., Rosenman & Colin, LLP, New York, NY.

APPEARING FOR APPELLEE: HAROLD I. GOODMAN, Esq., Raynes, McCarty, Binder, Ross & Mundy, Philadelphia, PA.

JUDGES:
PRESENT: Hon. John M. Walker, Jr., Chief Judge, Hon. James L. Oakes, Hon. Guido Calabresi, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the

judgment of said district court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Akos Swierkiewicz appeals from an August 1, 2000 judgment of the United States District Court for the Southern District of New York (Preska, J.) granting Sorema's motion to dismiss appellant's claims of discrimination based on national origin, pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000*(e); and age discrimination, pursuant to the Age Discrimination in Employment Act of 1967, *29 U.S.C. § 626*(c)(1). On appeal, Swierkiewicz argues that the district erred in dismissing the complaint because the district court improperly applied a heightened pleading requirement and, in the alternative, if he needed to comply with a heightened pleading requirement, he has done so and that dismissal was therefore unwarranted.

Swierkiewicz, of Hungarian descent, has been a United States citizen since 1970. Defendant-appellee Sorema is a reinsurance company headquartered in New York and principally owned and controlled by a French parent company. In April 1989, Swierkiewicz, at the age of 43, began working for Sorema as a Senior Vice President and Chief Underwriting Officer. In February 1995, Francois Chavel, Sorema's President and Chief Executive Officer, shifted Swierkiewicz's job responsibilities to marketing and services and transferred the bulk of Swierkiewicz's underwriting responsibilities to Nicolas Papadopoulo, a 32-year-old French national. At the time of this transition, Chavel stated that he wanted to "energize" the underwriting department. Swierkiewicz states that over the next two years he was "isolated by Mr. Chaval excluded from business decisions and meetings and denied the opportunity to reach his true potential at Sorema."

In April 1997, Swierkiewicz wrote a memorandum to Mr. Chaval outlining these grievances and concluding that he had no choice but to leave the company providing that a suitable

severance package was provided. Two weeks later, Sorema's general counsel informed Swierkiewicz that Swierkiewicz could either resign without a severance package or be terminated. Later that same day, upon Swierkiewicz's refusal to resign, Sorema fired him.

We review the district court's grant of motion to dismiss de novo. See *Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000)*.

"It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." *Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978);* see also, *Tarshis, 211 F.3d at 35.*

To plead discrimination based on national origin, a plaintiff must allege (1) membership, (2) qualification for the job in question, (3) an adverse employment action and (4) circumstances that give support to an inference of discrimination. See *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. With respect to national origin, the only circumstances Swierkiewicz pled are that he is Hungarian, others at Sorema are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the district court that these allegations are insufficient as a matter of law to raise an inference of discrimination.

To plead discrimination based on age, a plaintiff must allege that (1) he is in the protected age group, (2) he is qualified for the job, (3) he was discharged and (4) the discharge occurred under the circumstances giving rise to an inference of age discrimination. See *Hollander v. American Cyanamid Co., 172 F.3d 192, 198* (2d Cir.), cert. denied, *528 U.S. 965, 145 L. Ed. 2d 311, 120 S. Ct. 399 (1999)*. The only circumstance that Swierkiewicz alleges gives rise to an inference of age discrimination is Chavel's comment in 1995

that Chavel wanted to "energize" the underwriting department. We agree with the district court that this allegation is insufficient as a matter of law to raise an inference of discrimination.

We have considered Swierkiewicz's remaining arguments and consider them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the district court.

No. 99-Civil-12272

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

v.

SOREMA, N.A.,
Defendant

July 6, 2000 Judge Preska

TRANSCRIPT.

(In Open court)

THE COURT: Won't you be seated, counsel. We're here today on defendant's motion to dismiss the amended complaint.

First, I will state for the record that I do not rely on any of the material in the Brody affidavits beyond the documents referred to in the complaint, that is, the EEOC charge and the memorandum dated April 14, 1997. I disregard the other material as not cognizable on a motion to dismiss.

Counsel agree that the only allegedly adverse employment action at issue is the April, 1997 discharge of plaintiff by defendant. We spent a great deal of time discussing the legal significance of the material in the complaint and the other documents relating to earlier time periods, and, specifically, we've discussed the requirements of United Airlines v. Evans, 97 Supreme Court 1885 at 1889 (1977), to the effect that allegations relating to earlier time

periods "may constitute relevant background evidence in a proceeding... but separately considered... [are] merely unfortunate event[s] in history, which [have] no present legal consequences."

I need not decide today to what extent these earlier activities are relevant, as plaintiff suggests, for "context," that is, to show circumstances from which an inference of discrimination can be drawn, because on the record before me they are insufficient in any event.

Plaintiff has, in fact, adequately pled membership in a protected class, qualification for the job in question, and I assume arguendo, without deciding, that he has pled an adverse employment action. What he has not adequately pled are circumstances that support an inference of discrimination.

First, with respect to national origin discrimination, the factual context which counsel points me to is contained primarily in the April 14, 1997 memorandum where plaintiff tells his superior that he is unhappy at the company. He discusses his "gradual demotion" and his becoming "increasingly frustrated, burnt out, and demoralized by the lack of cooperation, unreasonable demands, and constant interference by [Nicholas Papadopoulo]."

Plaintiff goes on to state that he "found [him]self systematically excluded, cut off from any further participation despite [Mr. Papadopoulo's] lack of understanding of the U.S. marketing style."

Plaintiff also states that: "It is evident that I have not only reached the 'glass ceiling' at Sorema with no prospect for further advancement, but also encountering a hostile, demoralizing, and humiliating atmosphere and constant chaos, which is counterproductive to work efforts. In view of the above, after long and thoughtful considerations, I concluded that I have no other choice but to leave the company provided that a suitable and acceptable arrangement can be reached."

Plaintiff goes on to state what he considers such

suitable and acceptable arrangement, including a one-year paid leave of absence and other requirements. He concludes that memorandum by saying, "Because of the untenable work environment, I wish to leave as soon as the above outlined conditions are agreed to."

At oral argument, plaintiff's counsel concedes that there was nothing in the memorandum from which an inference of age or national origin discrimination can be made. Counsel argues that the use of the words "glass ceiling" might provide such an inference. I reject that suggestion. There is nothing in the memorandum from which age or national origin discrimination can be inferred, and the use of the popularized term "glass ceiling" is not sufficient.

Indeed, granting all inferences to plaintiff, the memorandum can be characterized as nothing other than plaintiff's dissatisfaction with his lot within the company for various nondiscriminatory reasons.

As plaintiff stated in his EEOC complaint, which I consider such since it was referred to in the amended complaint, following receipt of the April 14, 1997 memorandum, plaintiff's superiors gave him the option of either resigning or being terminated. He opted to be terminated. Plaintiff also states in the EEOC charge that his superiors at the company told him that he had committed a hostile act against the company by clearing out his personal items from the office. He continues, "This all stemmed from my untenable relationship with Nicholas Papadopoulo, (a natural born French citizen of Greek heritage/age 33), executive vice President and chief underwriting officer.

Finally, both in his EEOC charge and in the amended complaint, plaintiff alleges in a conclusory fashion that he was terminated as a result of his age and national origin. Plaintiff alleges in his complaint at, among other places, paragraphs 21, 24, 26 that other, in his view, less qualified individuals were promoted beyond him and alleges at paragraph 38 that individuals fired with cause were provided severance packages, and plaintiff was denied a severance

package. All of these are insufficient to raise an inference that the circumstances under which plaintiff was terminated were discriminatory.

With respect to national origin, the only mention of national origin is that plaintiff was of Hungarian descent, that other folks that were promoted were of different national origins, especially Mr. Papadopoulo, who is alleged to he a French citizen, and that there are no other Hungarians at any level within the company. These conclusory allegations are insufficient as a matter of law to raise an inference of discrimination.

With respect to age, plaintiff makes reference to a remark attributed to Mr. Papadopoulo—

MR. BRODY: Your Honor, excuse me. Mr. Chavel.

THE COURT:I'm sorry, Chavel. Thank you.

In February of 1995 or 1996, to the extent that Mr. Chavel wnted to "energize" the underwriting department. This remark was allegedly made at the time Mr. Papadopoulo, a younger man, is alleged to have assumed plaintiff's duties (amended complaint, paragraph 23). This remark is insufficient to create an inference of discrimination.

First, the remark is too vague to be considered age related, even giving all inferences in plaintiff's favor. Secondly, even if the remark were considered to be an age-related remark, it is far too remote in time and unrelated to the job action at issue. As I mentioned, the remark is alleged to have taken place in February of 1995 or February of 1996. Plaintiff's termination was in 1997, April of 1997. Accordingly, the remark was far too remote in time.

Secondly, the remark cannot be said to have been directed at plaintiff or his work activities in the manner discussed by Judge Sotomayor in Cartegna v. Ogden Services, Corp., 995 F. Supp. 459, 463 (S.D.N.Y. 1998). Accordingly, for both those reasons, the energized remark is insufficient to raise an inference of age discrimination.

With respect to the allegations that other folks were

promoted who were less qualified, those allegations boil down to exactly that. Plaintiff complains that other folks who, in his view, were less qualified were promoted ahead of him, in his place, assumed his duties and the like. Such allegations are insufficient to raise an inference of discriminatory circumstances.

Finally, with respect to the severance package allegations contained at paragraph 38 of the amended complaint, the sum and substance of those allegations is that other individuals who were fired for cause received severance and plaintiff did not. In both of these circumstances, that is, the promotions and the severance, there are no facts alleged which connect those actions to age or national origin discrimination with respect to plaintiff.

Indeed, during the course of oral argument, no such facts have been discussed in response to questions regarding the severance allegations. Counsel concedes that there were no facts that add to that allegation. Accordingly, even giving all inferences to plaintiff, as I must, on a motion to dismiss, I find that plaintiff has not adequately alleged a prima facie case, in that he has not adequately alleged circumstances that support an inference of discrimination.

Accordingly, the amended complaint is dismissed. The federal claims are insufficient, and I decline to exercise supplemental jurisdiction over the state claims. Because no additional facts have been discussed, which would cure the deficiencies in the federal claim, the dismissal is with prejudice.

Counsel, have I forgotten anything?

MS. BRODY: No, your Honor.

THE COURT: Thank you. Good morning, counsel.

MR. GOODMAN: Thank you, your Honor.

MS. BRODY: Thank you, your Honor.

No. 99-Civil-12272

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

v.

SOREMA, N.A.,
Defendant

JUDGMENT

Filed 7/31/00

Whereas the parties having appeared before this Court and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court, on July 26, 2000, having rendered its Memo Endorsed Order dismissing the amended complaint with prejudice, it is,
ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memo Endorsed Order dated July 26, 2000, the amended complaint is dismissed with prejudice.
DATED: 7/31/2000

August 2, 2000

Via Facsimile Only
Honorable Loretta A. Preska
United States District Judge
United States Courthouse
500 Pearl Street, Room 1320
New York, NY 10007

Re: **Swierkiewicz v. Sorema N.A.**
Docket No. 99-CV-12272 (LAP)

Dear Judge Preska:

I write to confirm my understanding that the Court would have dismissed with prejudice Mr. Swierkiewicz's amended complaint had he sought leave to amend paragraph 38 to state that the reason defendant Sorema treated him differently than the referenced employees was on account of his age and national origin. My understanding is drawn from the Court's bench ruling at the argument held on July 6, 2000.

If my understanding is correct, I do not wish to burden the Court with a futile motion for reconsideration pursuant to Rule 59, and wish only to ensure that the record is clear for appeal.

If I am mistaken in my assumption, I respectfully request that the Court consider this letter as a motion pursuant to Rule 59 and grant plaintiff additional time to file a memorandum of law in support of the motion.

Thank you very much.

Respectfully submitted,
Harold I. Goodman

HIG/vlf

Because counsel was unable to state any additional facts to be included in an amended complaint, any amendment would be futile.

So ordered,

Loretta A. Preska
USDJ

Dated: 8/11/2000

Supreme Court, U.S.
FILED
AUG 13 20
CLERK

No. 00-1853

IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

—v.—

SOREMA, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(212) 940-8800

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* *Counsel of Record*

QUESTION PRESENTED

Whether a complaint alleging claims of national origin and age discrimination against an employer was properly dismissed for failure to state a claim pursuant to Rule 12(b)(6), Fed. R. Civ. P., where it made no factual allegations to support a claim of discrimination and relied solely on conclusory allegations?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Sup. Ct. R., respondent states that Sorema, N.A. is wholly owned by Sorema, N.A. Holding Corp. which, in turn, is a privately held Delaware corporation. No publicly held company owns shares in respondent Sorema, N.A.

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No. 00-1853

IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

—v.—

SOREMA, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Sorema, N.A. respectfully requests that this Court deny the petition for a writ of certiorari of petitioner Akos Swierkiewicz seeking review of the summary order and judgment of the United States Court of Appeals for the Second Circuit dismissing his amended complaint.

DECISIONS BELOW

The Second Circuit (Walker, C.J., Oakes, J., and Calabresi, J.) issued an unreported summary order on March 12, 2001 affirming a decision of the United States District Court for the Southern District of New York. The Second Circuit decision appears in the appendix ("Pet. App.") to the petition for a writ of certiorari ("Pet."). *See* Pet. App. 1a-4a.

The District Court's decision was issued orally on July 6, 2000. The transcript of the decision is reprinted in the appendix to the petition. *See* Pet. App. 5a-9a.

STATEMENT OF THE CASE

Rule 8(a), Fed. R. Civ. P., provides that "[a] pleading . . . shall contain . . . a short and plain statement of the claim *showing that the pleader is entitled to relief*" (emphasis added). The Second Circuit and District Court both correctly recognized that the complaint in this action did not provide such a showing, and instead made clear that there was no basis for a claim of discrimination. Plaintiff's arguments to the contrary are erroneous and are premised upon a misapprehension of the lower Courts' decisions and of the controlling law. The Second Circuit summary order does not conflict with decisions of this Court or of other federal courts of appeals, and this case involves nothing more than the application of well-settled pleading rules. As such, it does not warrant this Court's review.

A. The Facts.

The facts set forth below are based on the allegations of plaintiff's amended complaint.[1] Sorema objects pursuant to Rule 15.2, Sup. Ct. R., to plaintiff's "Statement of Facts", because it refers to time-barred events and bare legal conclusions.

Plaintiff was born on July 25, 1946. Although he is of Hungarian descent, he has been a United States citizen for over 30 years. Pet. App. 2a.

Sorema is a reinsurance company with offices in New York City. Sorema hired plaintiff as a senior vice president in 1989, when he was 43 years old. Pet. App. 2a.

In February 1995, Francois Chavel, the president and chief executive officer of Sorema, made organizational changes at Sorema that resulted in a shift of plaintiff's job responsibilities from underwriting to marketing and services. Plaintiff's title remained unchanged. Certain underwriting responsibilities were assigned to Nicholas Papadopoulo, an employee who was 32 years old at the time and is a French national of Greek heritage. Plaintiff claims that Mr. Chavel, who is the same age as plaintiff,

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1 Contrary to plaintiff's assertion, the Second Circuit and the District Court both relied solely on plaintiff's pleading, and did not consider extraneous material. Pet. App. 5a.

commented that he wanted to "energize" the underwriting department. Pet. App. 2a.

In April 1997, more than two years after his job duties were changed, plaintiff wrote a memorandum to Mr. Chavel, announcing that he planned to leave Sorema because he was unhappy with his job and demanding a severance package. The memorandum describes, in detail, plaintiff's grievances with the company, none of which had anything to do with discrimination or plaintiff's age or national origin. Pet. App. 2a-3a.

As a result, plaintiff was given a choice of resigning or having his employment terminated. Plaintiff refused to resign because Sorema would not give him the severance package he had demanded. Consequently, plaintiff's employment was terminated on April 28, 1997. Pet. App. 3a.

B. The Proceedings In The District Court.

1. The Commencement Of The Action.

Plaintiff commenced this action on August 3, 1999 with the filing of a complaint. The complaint contained two claims based on the allegations set forth above, for national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA").

2. Sorema's Motion To Dismiss And The Amended Complaint.

By notice of motion dated February 1, 2000, Sorema moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the complaint on the grounds that the claims (i) are barred by the statute of limitations, and (ii) otherwise fail to state a claim for relief.

In response to Sorema's motion, plaintiff served an amended complaint, based on the same allegations, and adding claims under the New York State Human Rights Law, N.Y. Exec. Law § 292 *et seq.*, and the New York City Human Rights Law, New York City Admin. Code § 8-801 *et seq.*

3. The Oral Decision Of The District Court.

By oral decision and order dated July 6, 2000 (Pet. App. 5a-9a), the District Court granted Sorema's motion and dismissed plaintiff's amended complaint.

The District Court scrutinized the allegations of the amended complaint, including those outside of the applicable limitations period, and concluded that the amended complaint failed to state a federal claim of either national origin or age discrimination. The District Court found that plaintiff had not set forth sufficient facts to support a discrimination claim and relied solely on conclusory allegations. Moreover, the District Court pointed out -- and plaintiff's counsel so admitted at oral argument -- that plaintiff's April 1997 memorandum to Mr.

Chavel negated any inference of discrimination. Accordingly, the District Court dismissed plaintiff's amended complaint.[2]

4. The Judgment And Plaintiff's Post-Judgment Application.

The District Court entered judgment in favor of Sorema on August 1, 2000. Pet. App. 10a.

After entry of judgment, plaintiff made a letter application to the District Court to amend his pleading yet again to add another legal conclusion. Pet. App. 11a-12a.

By order dated August 11, 2000, the District Court denied plaintiff's application, ruling that, "[b]ecause counsel was unable to state any additional facts to be included in an amended complaint, any amendment would be futile". Pet. App. 12a.

C. The Summary Order Of The Second Circuit.

Plaintiff appealed the dismissal of his claims to the Second Circuit.

By summary order dated March 12, 2001, the Second Circuit affirmed the judgment of the District Court. Pet. App. 1a-4a.

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2 The District Court declined to exercise supplemental jurisdiction over plaintiff's state law claims, and dismissed those claims as well. Pet. App. 9a.

The Second Circuit restated the well-settled rule that, "a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)". The Second Circuit examined plaintiff's two federal claims in light of this rule. Pet. App. 3a.

The Second Circuit found that plaintiff had made only conclusory allegations and had not pled circumstances that would raise an inference of discrimination. The Second Circuit specifically considered, and rejected, plaintiff's claim that he was being held to a heightened pleading requirement.

Accordingly, the Second Circuit denied plaintiff's appeal.

REASONS FOR DENYING THE WRIT

Pursuant to the rules of this Court, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons". Sup. Ct. R. 10.

Plaintiff's petition does not present any "compelling reason" for this Court to exercise its discretion to review the Second Circuit decision. The Second Circuit did not depart from this Court's pleading standards nor is there a conflict among circuit courts on the issues presented in the petition. The decisions below correctly applied settled law, and involved issues so straightforward and ordinary that neither the District Court nor the Second Circuit found it necessary to render a formal

published opinion. Accordingly, plaintiff's petition should be denied.

I

THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

In assessing whether a petition for a writ of certiorari presents a "compelling reason" for review, this Court considers whether a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court". Sup. Ct. R. 10(c). Although plaintiff asserts that the Second Circuit decision "conflicts with binding precedent of this Court" (Pet. 7), as set forth below, there is no such conflict and the Second Circuit decision simply applies well-settled pleading standards articulated by this Court.

Plaintiff asserts that "[t]he Second Circuit misconceived . . . the applicable standard of review" in dismissing his complaint, and that he had only a "duty . . . to put the defendant on notice of the nature of his action". Pet. 7. Plaintiff further asserts that any requirement that he allege minimal facts from which discrimination may be inferred constitutes a "higher pleading standard than otherwise required by Rule 8(a)(2)". Plaintiff claims that the Second Circuit decision disregarded Rule 12(b)(6), Fed. R. Civ. P., and conflicted with this Court's decisions in *Conley v. Gibson*, 355 U.S. 41 (1957), *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Leatherman v. Tarrant County*

Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993). *See* Pet. 7-9.

Plaintiff's assertions are incorrect, and reflect a misunderstanding of this Court's decisions and the nature of notice pleading in federal court. Rule 12(b)(6), Fed. R. Civ. P., provides for dismissal of a pleading for "failure to state a claim upon which relief can be granted". *See also* Rule 8(a), Fed. R. Civ. P. According to the plain language of these rules, a pleading must contain some showing that the plaintiff is entitled to relief.

In *Conley*, this Court held that while "the Federal Rules of Civil Procedure do not require a claimant to set out *in detail* the facts upon which he bases his claim", what they do "require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is *and* the grounds upon which it rests". *Conley*, 355 U.S. at 47 (quoting Rule 8(a), Fed. R. Civ. P.) (emphasis added). In *Scheuer*, 416 U.S. at 236, this Court applied the standards it set forth in *Conley*, namely that, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". And, in *Leatherman*, 507 U.S. at 167 (citation omitted), this Court rejected a "more demanding rule for pleading a complaint under [42 U.S.C.] § 1983 than for pleading other kinds of claims for relief" whereby a plaintiff would be required to "'state with factual detail and particularity the basis for the claim which necessarily includes

why the defendant-official cannot successfully maintain the defense of immunity'".

Taken together, these opinions stand for the now familiar and unremarkable propositions that a complaint must set forth factual allegations and that civil rights claims need not be pleaded with greater detail or specificity than other claims. What they do not mean, and what this Court has never held, is that a complaint may survive a motion to dismiss merely by declaring the ultimate legal conclusion *with no facts whatsoever* to support the conclusion. Indeed, this Court has rejected any such approach, and dismissed a civil rights claim resting upon mere "vague and conclusory" allegations. *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 860 n.27 (1975).

There is thus no question that bare legal conclusions are insufficient to state a claim for relief. *See, e.g.*, 2 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 12.34[1][b], at 12-61 to 12-63 (3d ed. 1999) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss . . . The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice And Procedure* § 1357, at 340 (2d ed. 1990) ("[T]he pleader must set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist").

The Second Circuit, and the District Court before it, recognized these well-settled principles of pleading and applied them to the case at bar. After careful examination of plaintiff's amended complaint for allegations that could give rise to an inference of national origin or age discrimination, the lower courts correctly found that it contained nothing but bare legal conclusions. *See* Second Circuit decision, Pet. App. 3a ("It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)"); District Court decision, Pet. App. 8a ("[The complaint's] conclusory allegations are insufficient as a matter of law to raise an inference of discrimination"). Although plaintiff may have alleged "what the plaintiff's claim is [*viz.*, national origin and age discrimination]", he did not provide notice of "the grounds upon which it rests". *Conley*, 355 U.S. at 47. The Courts below therefore followed the requirements of notice pleading in dismissing plaintiff's amended complaint.

The decisions are also consistent with the policy underlying notice pleading. As this Court has explained, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome". *Conley*, 355 U.S. at 48. There is certainly no such concern here since plaintiff was afforded ample opportunity to allege some factual basis for his discrimination claims but was repeatedly unable to do so -- as his

counsel so admitted. *See* Pet. App. 7a, 9a, 11a-12a. Thus, his amended complaint was dismissed not because of any "misstep by counsel", but because plaintiff, who was represented by *two* experienced law firms, simply had no basis for his claims.

Furthermore, plaintiff's petition makes clear that his real grievance is not with the pleading standard employed by the Courts below but rather with its application to his particular allegations. Plaintiff argues that the Second Circuit "clearly erred in affirming the dismissal of his lawsuit" because "there clearly were sufficient facts pled in the amended complaint" (Pet. 9 n.4.). Even if plaintiff is correct (which he is not), "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law". Sup. Ct. R. 10. What plaintiff seeks here is another level of review, one that is not available in this Court.

Accordingly, review of this case is not warranted.

II

THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

In assessing whether a petition for a writ of certiorari presents a "compelling reason" for review, this Court also considers whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same

important matter". Sup. Ct. R. 10(a). Although plaintiff asserts that the Second Circuit decision "conflicts with precedent from five other courts of appeals" (Pet. 10), as set forth below, there is no such conflict, and even if there were, this case is not an appropriate vehicle for review.

A. There Is No Conflict In The Circuits.

Plaintiff asserts that, "[a]mong the circuit courts, only the Second Circuit has held that an employment discrimination plaintiff must plead the elements of a *McDonnell Douglas prima facie* case to withstand a defense motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure". Pet. 10. Plaintiff's assertion is erroneous, and is based upon a misreading of the Second Circuit decision.

The Second Circuit did not hold plaintiff to the strict elements of a *prima facie* case of discrimination. Rather, it applied the "well settled" rule, which accords with this Court's jurisprudence, that "a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)". Pet. App. 3a. Although the Second Circuit consulted *McDonnell Douglas* for general guidance in the discrimination context, it dismissed plaintiff's amended complaint because it offered only naked assertions and conclusory allegations -- not because it failed to allege "proof", as plaintiff would have this Court believe. *See* Pet. 10.

Moreover, the Second Circuit recognized that plaintiff's own allegations show that termination of plaintiff's employment was the result of his own ill-advised actions, and not discrimination. *See* Pet App. 2a-3a. Plaintiff's allegations regarding the circumstances surrounding his departure from Sorema in 1997 -- which *are* factually specific -- demonstrate that national origin and age had nothing to do with the termination of his employment. Thus, while plaintiff argues that "[f]ive times in his amended complaint Mr. Swierkiewicz pled that he was fired by Sorema on account of his national origin and his age" (Pet. 9), he fails to appreciate that naked conclusions, even those repeated "[f]ive times", do not negate detailed factual admissions that preclude relief.

The Second Circuit decision does not "conflict[ ] with precedent from five other courts of appeals". *See* Pet 10-11. A critical distinction, and a significant reason that there is no conflict, is that none of plaintiff's cases involved a situation where the complaint admitted the salient facts that bar the plaintiff's claim.

In addition, while certain of the cases identified by plaintiff suggest that it is not necessary to allege the precise *McDonnell Douglas* elements, none of them dispenses with the requirement that a plaintiff "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" as required by *Conley* (355 U.S. at 47). As explained by the Ninth Circuit in *Ortez v. Washington County, Oregon*, 88 F.3d 804, 808

(9th Cir. 1996) (emphasis added), "a plaintiff need not make a prima facie showing to survive a motion to dismiss *provided he otherwise sets forth a short and plain statement of his claim showing that he is entitled to relief*". That the plaintiff must make some *showing* of discrimination obviously comports with the pleading standards set by this Court and applied by the Second Circuit in the case at bar.

In each of plaintiff's circuit court cases, the plaintiff was able to do what plaintiff here could not -- provide the defendant with notice of some nonconclusory grounds for his discrimination claim. *See Weston v. Pennsylvania*, 251 F.3d 420, 433 (3rd Cir. 2001) (noting that hostile work environment claim was predicated on "comments, jokes, and jibes of [plaintiff's] co-workers and managers"); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) (noting that race discrimination claims contained "considerabl[e] . . . detail, fleshing out specific claims of both discriminatory failure to promote and discriminatory termination. . . [which] was more than was necessary to constitute the 'short and plain statement' required by Rule 8(a)"); *Bennett v. Schmidt*, 153 F.3d 516, 517-18 (7th Cir. 1998) (holding that race discrimination claim containing "six pages [of] detail" should not be dismissed for "excess length"); *Ortez*, 88 F.3d at 808 (noting that plaintiff made detailed allegations as to "different terms and conditions of employment" for Mexican-American workers including, "new policies regarding performance evaluations and new

policies regarding job duties and the assignment of responsibilities that were directed at him because of his Mexican-American origin"); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 928 (8th Cir. 1993) (holding that race discrimi-nation claim under the Fair Housing Act must plead "at least in general terms, the elements of a Fair Housing Act cause of action"). Thus, there is no conflict between these decisions and that of the Second Circuit in this case.

Finally, plaintiff errs in asserting that the Second Circuit stands alone in using the *McDonnell Douglas* elements as a guidepost to determine if a complaint states a claim of discrimination. The Sixth Circuit has squarely addressed this issue and held that, "[t]o survive the [defendant's] motion to dismiss, [plaintiff's] complaint must include factual allegations that provide direct evidence of a discriminatory motive or that support each element of a *prima facie* case under the criteria set forth in *McDonnell Douglas Corp. v. Green*". *Jackson v. City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999). In *Jackson*, the Sixth Circuit affirmed the dismissal of race discrimination claims because, "[w]ith regard to the *McDonnell Douglas* standard, the district court held that [plaintiff] failed to allege that he suffered an adverse employment action (the third prong) and also failed to establish that similarly situated non-minority employees were treated

differently (the fourth prong)". *Id.* at 752.[3] While the *prima facie* elements provide a useful framework for evaluating the sufficiency of a pleading, there may be situations where a plaintiff may plead discrimination through other means. The case at bar, however, is not one of those situations. To hold otherwise, would permit a plaintiff to proceed with a

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3 Likewise, district courts throughout the country look to the elements of a *prima facie* case under *McDonnell Douglas* in ruling on motions to dismiss discrimination claims. Recently, in *Vizcarrondo v. Bd. of Trustees of Univ. of Puerto Rico*, 139 F. Supp. 2d 198, 203 (D.P.R. 2001) (citation omitted), a district court employed these elements and "conclude[d] that plaintiff has failed to plead enough facts to establish a *prima facie* case under the *McDonnell Douglas* burden shifting framework . . . Therefore, since this Court 'is neither to credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation', plaintiff's Title VII claim must be dismissed". The same approach is followed by numerous other courts. *See Hayes v. Allstate Ins. Co.*, 95 F. Supp. 2d 832 (W.D. Tenn. 2000); *O'Patka v. Menasha Corp.*, 878 F. Supp. 1202 (E.D. Wis. 1995). S*ee also* John F. Buckley & Michael R. Lindsay, *Defense Of Equal Employment Claims* § 17.09, at 17-12 to 17-13 (2d ed. 1995) ("[T]o present a claim of discrimination, a plaintiff must either present direct evidence of discrimination or make out a *prima facie* case of discrimination and rely on the presumption that discrimination occurred. The plaintiff's failure to allege a *prima facie* case in the complaint provides avenue for a motion to dismiss").

discrimination action without any supporting factual allegations and would render meaningless this Court's requirement that a pleading "give the defendant fair notice of what the plaintiff's claim is *and* the grounds upon which it rests". *Conley*, 355 U.S. at 47 (emphasis added).

B. This Case Is Not An Appropriate Vehicle For Review.

A case does not present an important question of federal law, and a writ of certiorari will not be granted, where the circuit court's decision "involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties]". *Powell v. Nevada*, 511 U.S. 79, 86 (1994) (alteration in original). This is precisely such a case.

First, and as mentioned above, the fact-bound nature of this case makes it an inappropriate vehicle to address any issues presented in the petition. Plaintiff's situation is unique in that his own pleading, and the documents incorporated therein, negate any inference of discrimination by showing that plaintiff himself was responsible for his separation from the company. Plaintiff is dissatisfied that he did not receive the severance package that he demanded when he made his decision to leave Sorema. Therefore, this is a case that is limited to its facts.

Second, the Second Circuit decision was delivered in a summary order, which is unpublished and has no precedential value. *See* 2D CIR. R. § 0.23 (Summary orders "shall

not be cited or otherwise used in unrelated cases before this or any other court . . . [s]ince these statements do not constitute formal opinions of the court"). Likewise, the District Court issued its decision orally from the bench and there is no published decision. Therefore, the lower Courts' disposition of plaintiff's claims has no significance to anyone other than plaintiff himself. This is certainly not an appropriate case for which this Court should issue a writ of certiorari.

Accordingly, review of this case is not warranted.

* * *

This Court has cautioned that, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts". *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). None of these factors are present here. Accordingly, the petition should be denied.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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FRANCES KULKA BROWNE

ROSENMAN & COLIN LLP
Attorneys for Respondent
575 Madison Avenue
New York, New York 10022
(212) 940-8800

* COUNSEL OF RECORD

August 10, 2001

(8)

Supreme Court, U.S.
FILED
NOV 19 2001
CLERK

No. 00-1853

In the

Supreme Court of the United States

AKOS SWIERKIEWICZ,
Petitoner,

v.

SOREMA N.A.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT FILED JUNE 8, 2001
CERTIORARI GRANTED SEPTEMBER 25, 2001

51 pp

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RELEVANT DOCKETS ENTRIES

District Court

08/03/99	COMPLAINT filed United States District Court for the Eastern District of Pennsylvania.
11/15/99	ORDER filed on motion of Sorema N.A. transferring the action to the United States District Court for the Southern District of New York.
12/22/99	CASE DOCKETED in the United States District Court for the Southern District of New York.
02/01/00	NOTICE OF MOTION of Sorema N.A. to dismiss plaintiff's complaint, with affidavit, filed.
02/01/00	MEMORANDUM of Sorema N.A. in support of motion to dismiss.
02/29/00	MEMORANDUM of Akos Swierkiewicz in opposition to motion to dismiss.
03/01/00	REPLY MEMORANDUM of Sorema N.A. in further support of motion to dismiss.
04/19/00	AMENDED COMPLAINT.
05/25/00	SUPPLEMENTAL AFFIDAVIT in further support of motion to dismiss.

07/27/00	MEMO ENDORSEMENT on Transcript of hearing on 7/6/00; that the amended complaint is dismissed. The federal claims are insufficient, and I decline to exercise supplemental jurisdiction over the state claims. Because no additional facts have been discussed that would cure the deficiencies in the federal claim, the dismissal is with prejudice (signed by Judge Loretta A. Preska).
07/31/00	JUDGMENT; that for the reasons stated in the Courts Memo Endorsed Order, the amended complaint is dismissed with prejudice (signed by James M. Parkinson, Clerk of the Court).
08/16/00	NOTICE OF APPEAL of Akos Swierkiewicz.
08/18/00	MEMO ENDORSEMENT on 8/1/00 letter on behalf of Akos Swierkiewicz; because counsel was unable to state any additional facts to be included in an amended complaint, any amendment would be futile (signed by Judge Loretta A. Preska).

Court of Appeals for the Second Circuit

11/30/00	BRIEF of appellant Akos Swierkiewicz filed.

11/30/00	JOINT APPENDIX filed. Number of volumes: I.
01/05/01	BRIEF of appellee Sorema N.A. filed.
01/23/01	REPLY BRIEF of appellant Akos Swierkiewicz filed.
03/05/01	CASE heard before WALKER CH. J, OAKES, CALABRESI C. JJ.
03/12/01	JUDGMENT filed; judgment of the District Court is affirmed.
03/12/01	LETTER dated 2/9/01 pursuant to Rule 28(j) on behalf of appellant Akos Swierkiewicz.
04/02/01	Judgment MANDATE issued.

Supreme Court

06/08/01	PETITION FOR WRIT OF CERTIORARI filed by Akos Swierkiewicz.
09/25/01	WRIT granted.

99-CV-3917
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

AKOS SWIERKIEWICZ,
Plaintiff,

against

SOREMA, N.A.,
Defendant.

JURY TRAIL DEMANDED

COMPLAINT

1. This is an employment discrimination action brought by Akos Swierkiewicz to recover damages against SOREMA N.A. ("SOREMA") for the violation of his rights under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et. seq. ("Title II") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq. ("ADEA").

JURISDICTION AND VENUE

2. Jurisdiction over Mr. Swierkiewicz's Title VII claim is conferred by 42 U.S.C. §2000e-5(f)(3). Jurisdiction over his ADEA claim is conferred by 29 U.S.C. §626(c)(1).

3. Venue is proper in this district pursuant to the general venue statute, 28 U.S.C. §1391, and under Title VII's special venue statute, 42 U.S.C. §2000e-5(f)(3).

PARTIES

4. Plaintiff, Akos Swierkiewicz, resides at 821 Hudson Drive, Yardley, Pennsylvania 19067.

5. Defendant SOREMA is a New York corporation headquartered at 199 Water Street, 20th Floor, New York, New York 10038.

6. At all times relevant hereto, SOREMA has resided and conducted business in this judicial district.

7. At all times relevant hereto, SOREMA has been an employer within the meaning of Title VII and the ADEA.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. On or about July 11, 1997 Mr. Swierkiewicz filed a Charge of Discrimination against SOREMA with the Philadelphia District Office of the Equal Employment Opportunity Commission ("EEOC"), Charge No. 170971447, charging it with unlawful national origin and age discrimination in connection with his dismissal from employment.

9. By notice dated May 3, 1999 and which he received on May 5, 1999, Mr. Swierkiewicz was notified by the EEOC of his right to file a civil action against SOREMA.

10. This lawsuit has been timely filed within 90 days of Mr. Swierkiewicz's receipt of the EEOC's right-to-sue notice.

FACTUAL ALLEGATIONS

11. Mr. Swierkiewicz is a native of Hungary. He became a United States citizen in 1970.

12. Mr. Swierkiewicz is 53 years old. His date of birth is July 25, 1946,

13. SOREMA was formed in 1989. It is a reinsurance company principally owned and controlled by a

French parent corporation. At all times relevant hereto, SOREMA's Chief Executive Officer has been François M. Chavel, a French national.

14. From 1970 to 1986, Mr. Swierkiewicz was employed by INA which after its merger in 1982 with Connecticut General, became CIGNA Insurance Company. His last position at CIGNA was Vice President of Special Risk Facilities.

15. From 1986 to 1989, Mr. Swierkiewicz was employed by SCOR U.S., a reinsurance company, as Senior Vice President for Research and Special Risks.

16. On April 17, 1989 Mr. Swierkiewicz began his employment with SOREMA in the position of Senior Vice President and Chief Underwriting Officer ("CUO").

17. In all respects, Mr. Swierkiewicz performed his job in a satisfactory and exemplary manner.

18. Despite plaintiff's stellar performance, in February 1995 Mr. Chavel demoted him from his CUO position to a marketing and services position and transferred the bulk of his underwriting responsibilities to another French national, Nicholas Papadopoulo, who was 32 years old at the time (and 16 years younger than plaintiff).

19. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).

20. A year later, in or about February 1996, Mr. Chavel formally appointed Mr. Papadopoulo as SOREMA's CUO.

21. Mr. Papadopoulo was far less experienced and less qualified to be SOREMA's CUO than was Mr. Swierkiewicz. Indeed, Mr. Papadopoulo had just one year of underwriting experience prior to being appointed CUO by Mr. Chavel. By contrast, plaintiff had more than 26 years of broad based experience in the insurance and reinsurance industry.

22. At the time Mr. Papadopoulo assumed plaintiff's duties as CUO, Mr. Chavel stated that he wanted to "energize" the underwriting department - clearly implying that plaintiff was too old for the job.

23. In light of Mr. Papadopoulo's inexperience, Mr. Chavel brought in Daniel Peed from SOREMA's Houston, Texas office to support him in his CUO duties. Mr. Peed, like Mr. Papadopoulo, was in his early 30s. Shortly after his transfer to SOREMA's office in New York City, Mr. Chavel promoted Mr. Peed to the position of Senior Vice President of Risk Property.

24. Prior to his transfer, Mr. Peed had been a Second Vice President reporting to plaintiff.

25. Not long after plaintiff's demotion, SOREMA hired another French national, Michel Gouze, as Vice President in charge of Marketing. Mr. Gouze, unlike plaintiff, had very little prior experience in the insurance/reinsurance business.

26. Because of his inexperience, Mr. Gouze needed to rely on Mr. Swierkiewicz to perform his marketing duties for SOREMA.

27. Mr. Gouze's marketing duties at times overlapped with those of plaintiff. Despite Mr. Swierkiewicz's requests to better coordinate their duties, Mr. Chavel refused to accommodate those requests or to have Mr. Gouze report to plaintiff.

28. Mr. Swierkiewicz was isolated by Mr. Chavel following his demotion, excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA.

29. Efforts by Mr. Swierkiewicz to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subjected following his demotion proved unsuccessful.

30. On April 14, 1997, following two years of ongoing discrimination on account of his national origin and age, Mr. Swierkiewicz sent a memo to Mr. Chavel outlining his grievances and requesting a severance package to resolve his disputes with SOREMA.

31. Mr. Chavel did not respond to Mr. Swierkiewicz's memo.

32. In the morning, on Tuesday April 29, 1997, Mr. Chavel and Daniel E. Schmidt, IV, SOREMA's General Counsel, met with Mr. Swierkiewicz and gave him two options: either resign his job (with no severance package) or be fired.

33. Mr. Swierkiewicz refused to resign his employment with SOREMA.

34. As a result, he was fired by Mr. Chavel, effective that very day (April 29, 1997).

35. SOREMA had no valid basis to fire Mr. Swierkiewicz.

36. Plaintiffs age and national origin were motivating factors in SOREMA's decision to terminate his employment.

37. Unlike plaintiff who was fired without cause and without any severance pay or benefits, SOREMA has provided generous severance packages to a number of former executives for whom it had cause to terminate their employment. These include, but are not limited to, the following individuals: Jay Kubinak, Thilo Herda, Douglas Zale, Nigel Harley and Marcus Corbally.

38. As a direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered and will continue to suffer a substantial loss of earnings to which he otherwise would have been entitled. This includes, but is not limited to, the loss of his salary, bonus, automobile allowance and pension credits as well as the loss of his medical and dental insurance, life insurance, short and long term disability insurance and the insurance he had for accidental death and dismemberment.

39. As a further direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered damage to his reputation and harm to his career. He has also experienced physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

40. SOREMA acted willfully and in reckless disregard of Mr. Swierkiewicz's rights under Title VII and the ADEA by discharging him from employment on account of his age and national origin.

STATEMENT OF CLAIMS

COUNT I: VIOLATION OF TITLE VII

41. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 -40 of the Complaint as if they were set forth in full.

42. SOREMA terminated Mr. Swierkiewicz's employment on account of his national origin and thereby violated his right to equal employment opportunity as protected by Title VII.

COUNT II: VIOLATION OF THE ADEA

43. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 -42 of the Complaint as if they were set forth in full,

44. SOREMA terminated Mr. Swierkiewicz's employment on account of his age and thereby violated his right to equal employment opportunity as protected by the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Mr. Swierkiewicz respectfully requests the Court to enter judgment in his favor and against SOREMA, and to accord him the following relief:

(a) Back pay with prejudgment interest and all the fringe benefits to which he is entitled;

(b) Front pay and benefits to the extent reinstatement is not feasible;

(c) Compensatory damages for his non-economic injuries in an amount authorized by Title VII;

(d) Punitive damages to punish and deter SOREMA from future acts of employment discrimination in an amount authorized by Title VII;

(e) Liquidated damages in an amount equal to twice Mr. Swierkiewicz's back pay losses as authorized by the ADEA;

(f) An award of reasonable counsel fees and costs to compensate Mr. Swierkiewicz for having to prosecute this action against SOREMA; and

(g) Such other legal and equitable relief or may be just and proper under the circumstances.

JURY DEMAND

Mr. Swierkiewicz demands a trial by jury on all the issues in this action that are triable by law.

Respectfully submitted,

RAYNES, MCCARTY, BINDER, ROSS &MUNDY

HAROLD L GOODMAN, ESQUIRE
1845 Walnut Street, 20th Floor
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(215)568-6190
Counsel for Plaintiff
Akos Swierkiewicz
Dated: August 3, 1999

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575 Madison Avenue
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(212) 940-8800
LRB- 4151

99 Civ. 12272 (LAP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

against

SOREMA, N.A.,
Defendant.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the complaint dated August 3, 1999, and upon the annexed affidavit of Lauren Reiter Brody, sworn to February 1, 2000, and the exhibits thereto, the undersigned will move this Court, before the Honorable Loretta A. Preska, in Courtroom 12A of the United States Courthouse, 500 Pearl Street, New York, New York, on February 24, 2000, for an order, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, (a) dismissing plaintiff's complaint on the grounds that the claims asserted therein are barred by the statute of limitations and otherwise fail to state a claim for relief, and (b) granting such other relief as is just and proper.
February 1, 2000

ROSENMAN & COLIN LLP

By: Lauren Reiter Brody

Attorneys for Defendant
575 Madison Avenue
New York, New York 10022
(212) 940-8800

TO: VLADECK, WALDMAN,
ELIAS & ENGELHARD, P.C.
Attorneys for Plaintiff
1501 Broadway
New York, New York 10036
(212) 403-7300

99 Civ. 12272 (LAP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

against

SOREMA, N.A.,
Defendant.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LAUREN REITER BRODY, being duly sworn, deposes and says:

1. I am a member of the firm of Rosenman & Colin LLP, attorneys for defendant Sorema N.A. ("Sorema"). I submit this affidavit in support of Sorema's motion, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, to dismiss the complaint herein, on the grounds that plaintiff's claims (i) are barred by the statute of limitations, and (ii) otherwise fail to state a claim for relief. A copy of the complaint is annexed hereto as Exhibit A.

2. Plaintiff Akos Swierkiewicz ("Swierkiewicz") was employed by Sorema for approximately eight years as a

Senior Vice President, Swierkiewicz was 43 years old when he began his employment with Sorema.

3. In February 1995, a reorganization occurred at Sorema which resulted in changes to Swierkiewicz's job responsibilities.

4. In April 1997, more than two years after the reorganization, Swierkiewicz wrote a letter to Francois Chavel ("Chavel"), Sorema's President and Chief Executive Officer, informing Chavel that he was unhappy with his job and intended to leave the company, and demanding a severance package. The letter did not complain of or mention any discrimination against Swierkiewicz. Swierkiewicz subsequently went to his office and cleaned out all of his personal belongings.

5. As a result of Swierkiewicz's actions, Chavel gave Swierkiewicz two choices: either resign his job or be fired. Swierkiewicz refused to resign because Sorema did not grant him the severance he demanded.

6. In July 1997, Swierkiewicz filed a charge of discrimination with the Equal Employment Opportunity Commission (the "EEOC"), alleging discrimination on the basis of his national origin and age. A copy of Swierkiewicz's EEOC charge is annexed hereto as Exhibit B.

7. In August 1999, Swierkiewicz commenced an action against Sorema asserting claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination In Employment Act ("ADEA"). The complaint contains two counts, one for national origin discrimination under Title VII, and the other for age discrimination under the ADEA.

8. This motion seeks dismissal of Swierkiewicz's complaint for the following reasons. First, Swierkiewicz's claims should be dismissed because they are untimely. Second, Swierkiewicz's claims should be dismissed because they fail to state a prima facie case of discrimination based on national origin or age.

9. For the foregoing reasons, and for the reasons set forth in the accompanying memorandum, it is respectfully submitted that Sorema's motion to dismiss be granted.

LAUREN REITER BRODY

Sworn to before me this
1st day of February, 2000

NOTARY PUBLIC

PENNY KAUFMAN
Notary Public, State al New York
No. 01KA6031140
Qualified in Kings County
Commission Expires Sep. 27, 2001

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. Fancois Chavel
President/C.E.O.
Sorema
199 Water Street 20th Floor
New York, NY 10038

PERSON FILING CHARGE
Swierkiewcz, Akos

THIS PERSON (check one)
X CLAIMS TO BE AGGRIEVED

IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION

Earliest	Most Recent
04/29/97	04/29/97

PLACE OF ALLEGED VIOLATION
New York, NY

CHARGE NUMBER
170971447

NOTICE OF CHARGE OF DISCRIMINATION
(See EEOC "Rules and Regulations"
before completing this form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

■ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

■ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

THE AMERICANS WITH DISABILITIES ACT

THE EQUAL PAY ACT (29 U.S.C., SECT. 206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ■ No action is required on your part at this time.

2. Please submit by _____ a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of this file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.

3. Please respond fully by _____ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Philadelphia District Office
The Bourse, Suite 400
21 S. Fifth Street
Philadelphia, PA 19106-2515

Joan D. Gmitter, Supervisor
(Commission Representative)

(215) 451-5803
(Telephone Number)

ENCLOSURE: COPY OF CHARGE
BASIS OF DISCRIMINATION

RACE COLOR SEX RELIGION ■ NAT. ORIGIN ■ AGE DISABILITY RETALIATION OTHER
CIRCUMSTANCES OF ALLEGED VIOLATION
DATE: 07/25/97

TYPED NAME/TITLE OF AUTHORIZED
EEOC OFFICIAL

Marie M. Tomasso

SIGNATURE

RESPONDENT'S COPY

CHARGE OF DISCRIMINATION
EEOC CHARGE NUMBER 170971447

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. I was hired by the Respondent on April 17, 1989 as a Senior Vice President and Chief Underwriting Officer. On April 29, 1997, I was discharged.

II. Francois Chavel (French/50) President/CEO, gave me the option to either resign or be terminated. I opted to be terminated. He told me that I committed a hostile act against the company by clearing out my personal items from my office. This all stemmed from my untenable relationship with Nicholas Papadopoulo (a natural born French citizen of

Greek heritage/age 33) Executive Vice President and Chief Underwriting Officer.

III. I believe that I have been discriminated against because of my national origin (Hungarian) and because of my age (51) because:

1. In February 1995, my position of Senior Vice President was eliminated and I was demoted to newly created position of Services retaining only a small part of my underwriting responsibilities. Mr. Chavel informed that the bulk of my former responsibilities would be transferred to Nicolas Papadopoulo (a natural born French citizen of Greek heritage/age 33).

2. To my belief I was more qualified than Mr. Papadopoulo. I base this on my experience and knowledge of the industry. In addition, Mr. Papadopoulo had no underwriting experience.

3. There were no other Hungarians at any level in the company.

4. I was never informed by Mr. Chavel that my performance was less than satisfactory, nor was I ever counseled and/or warned about my performance from Mr. Chavel.

5. The Respondent is a French owned company.

NO. 99 Civ. 12272 (LAP)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff,

v.

SOREMA, N.A.,
Defendant.

AMENDED COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, plaintiff, Akos Swierkiewicz, amends his complaint as a matter of course to state claims for relief against defendant, SOREMA, N.A., for violations of the New York State Executive Law, §296 et.seq. and the Administrative Code of the City of New York, §8-107 et. seq.

1. This is an employment discrimination action brought by Akos Swierkiewicz to recover damages against SOREMA NA ("SOREMA") for the violation of his rights under Title VII of the 1964 Civil Rights Act 42 U.S.C. §2000e et.seq. ("Title VII"); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq. ("ADEA"); the New York State Executive Law, §296 et. seq. (the "Human Rights Law"); and the Administrative Code of the City of New York, §8-107 et. seq. (the "City Law").

JURISDICTION AND VENUE

2. Jurisdiction over Mr. Swierkiewicz's Title VII claim is conferred by 42 U.S.C §2000e-5(f)(3). Jurisdiction over his ADEA claim is conferred by 29 U.S.C. §626(c)(1).

Supplemental jurisdiction over his Human Rights Law and City Law claims is conferred by 29 U.S.C. §1367(a).

3. Venue is proper in this district pursuant to the general venue statute, 28 U.S.C. §1391, and under Title Vll's special venue statute, 42 U.S.C. §2000e-5(f)(3).

PARTIES

4. Plaintiff, Akos Swierkiewicz, resides at 821 Hudson Drive Yardley, Pennsylvania 19067.

5. Defendant SOREMA is a New York corporation headquartered at 199 Water Street, 20th Floor, New York, New York 10038.

6. At all times relevant hereto, SOREMA has resided and conducted business in this judicial district.

7. At all times relevant hereto, SOREMA has been an employer within the meaning of Title VII and the ADEA.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. On or about July 11, 1997 Mr. Swierkiewicz filed a Charge of Discrimination against SOREMA with the Philadelphia District Office of the Equal Employment Opportunity Commission ("EEOC"), Charge No. 170971447, charging it with unlawful national origin and age discrimination in connection with his dismissal from employment.

9. By notice dated May 3, 1999 and which he received on May 5 1999, Mr. Swierkiewicz was notified by the EEOC of his right to file a civil action against SOREMA.

10. This lawsuit has been timely filed within 90 days of Mr. Swierkiewicz's receipt of the EEOC's right-to-sue notice.

11. Pursuant to §8-502(c) of the City Law, prior to filing this Amended Complaint, plaintiff Swierkiewicz served a copy of the Amended Complaint on the City of New York Commission on Human Rights and the City of New York Corporation Counsel.

FACTUAL ALLEGATIONS

12. Mr. Swierkiewicz is a native of Hungary. He became a United States citizen in 1970.

13. Mr. Swierkiewicz is 53 years old. His date of birth is July 25, 1946.

14. SOREMA was formed in 1989. It is a reinsurance company principally owned and controlled by a French parent corporation. At all times relevant hereto, SOREMA's Chief Executive Officer has been François M. Chavel, a French national.

15. From 1970 to 1986, Mr. Swierkiewicz was employed by INA which after its merger in 1982 with Connecticut General, became CIGNA Insurance Company. His last position at CIGNA was Vice President of Special Risk Facilities.

16. From 1986 to 1989, Mr. Swierkiewicz was employed by SCOR U. S., a reinsurance company, as Senior Vice President for Research and Special Risks.

17. On April 17, 1989 Mr. Swierkiewicz began his employment with SOREMA in the position of Senior Vice President and Chief Underwriting Officer ("CUO").

18. In all respects, Mr. Swierkiewicz performed his job in a satisfactory and exemplary manner.

19. Despite plaintiff's stellar performance, in February 1995 Mr. Chavel demoted him from his CUO position to a marketing and services position and transferred the bulk of his underwriting responsibilities to another French national, Nicholas Papadopoulo, who was 32 years old at the time (and 16 years younger than plaintiff).

20. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).

21. A year later, in or about February 1996, Mr. Chavel formally appointed Mr. Papadopoulo as SOREMA's CUO.

22. Mr. Papadopoulo was far less experienced and less qualified to be SOREMA's CUO than was Mr. Swierkiewicz. Indeed, Mr. Papadopoulo had just one year of underwriting experience prior to being appointed CUO by Mr. Chavel. By contrast, plaintiff had more than 26 years of broad based experience in the insurance and reinsurance industry.

23. At the time Mr. Papadopoulo assumed plaintiff's duties as CUO, Mr. Chavel stated that he wanted to "energize" the underwriting department-- clearly implying that plaintiff was too old for the job.

24. In light of Mr. Papadopoulo's inexperience, Mr. Chavel brought in Daniel Peed from SOREMA's Houston, Texas office to support him in his CUO duties. Mr. Peed, like Mr. Papadopoulo, was in his early 30s. Shortly after his transfer to SOREMA's office in New York City, Mr.

Chavel promoted Mr. Peed to the position of Senior Vice President of Risk Property.

25. Prior to his transfer, Mr. Peed had been a Second Vice President reporting to plaintiff.

26. Not long after plaintiff's demotion, SOREMA hired another French national, Michel Gouze, as Vice President in charge of Marketing. Mr. Gouze, unlike plaintiff, had very little prior experience in the insurance/reinsurance business.

27. Because of his inexperience, Mr. Gouze needed to rely on Mr. Swierkiewicz to perform his marketing duties for SOREMA.

28. Mr. Gouze's marketing duties at times overlapped with those of plaintiff. Despite Mr. Swierkiewicz's requests to better coordinate their duties, Mr. Chavel refused to accommodate those requests or to have Mr. Gouze report to plaintiff.

29. Mr. Swierkiewicz was isolated by Mr. Chavel following his demotion, excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA.

30. Efforts by Mr. Swierkiewicz to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subjected following his demotion proved unsuccessful.

31. On April 14, 1997, following two years of ongoing discrimination on account of his national origin and age, Mr. Swierkiewicz sent a memo to Mr. Chavel outlining his grievances and requesting a severance package to resolve his disputes with SOREMA.

32. Mr. Chavel did not respond to Mr. Swierkiewicz's memo.

33. In the morning, on Tuesday April 29, 1997, Mr. Chavel and Daniel E. Schmidt, IV, SOREMA's General Counsel, met with Mr. Swierkiewicz and gave him two options: either resign his job (with no severance package) or be fired.

34. Mr. Swierkiewicz refused to resign his employment with SOREMA.

35. As a result, he was fired by Mr. Chavel effective that very day (April 29, 1997).

36. SOREMA had no valid basis to fire Mr. Swierkiewicz.

37. Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment.

38. Unlike plaintiff who was fired without cause and without any severance pay or benefits, SOREMA has provided generous severance packages to a number of former executives for whom it had cause to terminate their employment. These include, but are not limited to the following individuals: Jay Kubinak, Thilo Herda, Douglas Zale, Nigel Harley and Marcus Corbally.

39. As a direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered and will continue to suffer a substantial loss of earnings to which he otherwise would have been entitled. This includes, but is not limited to, the loss of his salary, bonus, automobile allowance and pension credits as well as the loss of his medical and dental insurance, life insurance, short and long term disability

insurance and the insurance he had for accidental death and dismemberment.

40. As a further direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered damage to his reputation and harm to his career. He has also experienced physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

41. SOREMA acted willfully and in reckless disregard of Mr. Swierkiewicz's rights under Title VII and the ADEA by discharging him from employment on account of his age and national origin.

STATEMENT OF CLAIMS

COUNT I: VIOLATION OF TITLE VII

42. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1- 41 of the Amended Complaint as if they were set forth in full.

43. SOREMA terminated Mr. Swierkiewicz's employment on account of his national origin and thereby violated his right to equal employment opportunity as protected by Title VII.

COUNT II: VIOLATION OF THE ADEA

44. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1- 43 of the Amended Complaint as if they were set forth in full.

45. SOREMA terminated Mr. Swierkiewicz's employment on account of his age and thereby violated his right to equal employment opportunity as protected by the ADEA.

COUNT III: VIOLATION OF THE HUMAN RIGHTS LAW

46. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraph 1 -45 of the Amended Complaint as if they were set forth in full.

47. Sorema terminated Mr. Swierkiewicz's employment on account of his national origin and/or age in violation of his right to equal employment opportunity as protected by the Human Rights Law, §298 et. seq.

COUNT IV: VIOLATION OF THE CITY LAW

48. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 -47 of the Amended Complaint as if they were set forth in full.

49. Sorema terminated Mr. Swierkiewicz's employment on account of his national origin and/or age in violation of his right to equal employment opportunity as protected by the City Law, §8-107 et. seq.

PRAYER FOR RELIEF

WHEREFORE, Mr. Swierkiewicz respectfully requests the Court to enter judgment in his favor and against SOREMA, and to accord him the following relief:

(a) Back pay with prejudgment interest and all the fringe benefits to which he is entitled;

(b) Front pay and benefits to the extent reinstatement is not feasible:

(c) Compensatory damages for his non-economic injuries in an amount authorized by Title VII and by the Human Rights Law and the City Law;

(d) Punitive damages to punish and deter SOREMA from future acts of employment discrimination in an amount authorized by Title VII and the City Law;

(e) Liquidated damages in an amount equal to twice Mr. Swierkiewicz's back pay losses as authorized by the ADEA;

(f) An award of reasonable counsel fees and costs to compensate Mr. Swierkiewicz for having to prosecute this action against SOREMA; and

(g) Such other legal and equitable relief or may be just and proper under the circumstances.

JURY DEMAND

Mr. Swierkiewicz demands a trial by jury on all the issues in this action that are triable by law.

Respectfully submitted,

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(215)568-6190

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LRB- 4151

99 Civ. 12272 (LAP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AKOS SWIERKIEWICZ,
Plaintiff

against

SOREMA N.A.,
Defendant.

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LAUREN REITER BRODY, being duly sworn, deposes and says:

1. I am a member of the firm of Rosenman & Colin LLP, attorneys for defendant Sorema. Pursuant to the Court's request, I make this supplemental affidavit to submit to the Court a memorandum dated April 14, 1997 from plaintiff Swierkiewicz to Francois Chavel. A copy of the April 14 memorandum is annexed hereto as Exhibit A.

2. The April 14 memorandum is the document referred to in plaintiff's complaint (see Compl. ¶ 30), and in Sorema's papers in support of its motion,

LAUREN REITER BRODY

Sworn to before me this
23rd day of May. 2000

Notary Public

PENNY KAUFMAN
Notary Public, State New York
No, 01KA6031140
Qualified in Kings County
Commission Expires Sep. 27, 2001

Exhibit A to Supplemental Affidavit of Lauren Reiter Brody

Confidential
To: Francois Chavel
From: Akos Swierkiewicz

4/14/97

Starting April '89 I am proud of my positive contribution to SOREMA, ranging from enhancing the company's image and reputation to achieving a consistently below industry average loss ratios during my tenure as C.U.O.

My "reward" was a gradual demotion, first eliminating my C.U.O. position in 1995, which was awarded a year later to Nicolas Papadopoulo.

I have become increasingly frustrated, burnt out and demoralized by the lack of cooperation, unreasonable demands and constant interference by NP. I have documented numerous evidence reflecting the chaotic situation (files available upon request).

Partial Highlights:

1. After promoting, marketing of program business to reinsurance brokers, followed by numerous visits and thorough analysis, my evaluation was discarded and replaced by new version created by the U.W. Dept., inferior both in style and content, almost embarrassing.

2. Total lack of communication from U.W. Dept. regarding marketing plans and activities resulting in confusing information to brokers and clients.

3. When potential marketing leads are presented and followed up they are ignored, rejected by BG, who in his unexplained and highly negative attitude considers them "harassment" -forgetting the purpose of his employment. (Disregarded cases are documented.)

4. Because of the extensive contacts I built up in the industry, I was successful in arranging numerous marketing visits involving and introducing NP to senior brokers and insurers. After paving the way for these contacts I found myself systematically excluded, cut off from any further participation despite NP's lack of understanding of the US. marketing style.

5. My repeated requests for timely responses to retrocession information and A.M. Best related issues are ignored, thereby creating crisis reactions. Such last minute scrambling not only disrupts scheduling and work priorities but also opens the door for errors. Example. In February, I ended up spending (wasting) 1 full week with Greg Cuilwik on the Catastrophe Driven placement information due to lack of clarity, confusion, constant changes end new demands by NP yet at the same time, shifting the blame and responsibilities on me for his own neglect and delays.

6. Despite my previous objections and protest NP continues to bypass reporting relationships, directing his changing demands to GC regarding retrocession matters. In addition to undermining my authority and to his abusive attitude I have also learned of his negative remarks concerning me -which I strongly object to.

7. Despite my loyalty to the Company, it became increasingly difficult to defend, protect and enhance SOREMA's and Fulcrum's image to the outside world.

The above highlights represent only a partial list and only barely touches the surface pertaining to the continuous tension, the ongoing animosities, and intolerable corporate behavior.

It is evident that I have not only reached the "glass ceiling" at SOREMA with no prospect for future

advancement but also encountering a hostile, demoralizing and humiliating atmosphere and constant chaos, which is counterproductive to work efforts. In view of the above, after long and thoughtful considerations I concluded that I have no other choice but to leave the company, provided that a suitable and acceptable arrangement can be reached:

A. 1 year paid leave of absence (with all benefits, including medical, dental, short and long term disability term life insurance, 401K contribution, company car, pension contribution, etc.);

B. Continue as board member of SOREMA N.A. and Fulcrum;

C. Communication regarding my "departure" to employees and all others should be presented as follows: "At AS' own request it has been agreed that he will take 1 year leave absence from his positions at SOREMA and Fulcrum but will continue to be board member of both companies."

Because of the untenable work environment I wish to leave as soon as above outlined conditions are agreed to.

99 Civ. 12272 (LAP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AKOS SWERKIEWICZ,
Plaintiff,

v.

SOREMA,
Defendant.

July 6, 2000
9:00 a.m.

Before:

HON. LORETTA A. PRESKA
District Judge

APPEARANCES

VLADECK, WALOMAN & ENGLEHARD
Attorneys for Plaintiff
BY: HAROLD I. GOODMAN
ANNE L. CLARK

ROSENMAN & COLIN
Attorneys for Defendant
BY: LAUREN R BRODY

(In open court)

THE COURT: Won't you be seated, counsel, We're here today on defendant's motion to dismiss the amended complaint.

First, I will state for the record that I do not rely on any of the material in the Brody affidavits beyond the documents referred to in the complaint, that is, the EEOC charge and the memorandum dated April 14, 1997. I disregard the other material as not cognizable on a motion to dismiss.

Counsel agree that the only allegedly adverse employment action at issue is the April, 1997 discharge of plaintiff by defendant. We spent a great deal of time discussing the legal significance of the material in the complaint and the other documents relating to earlier time periods, and, specifically, we've discussed the requirements of United Airlines v. Evans, 97 Supreme Court 1885 at 1889 (1977), to the effect that allegations relating to earlier time periods "may constitute relevant background evidence in a proceeding... but separately considered... [are] merely unfortunate event[s] in history, which [have] no present legal consequences."

I need not decide today to what extent these earlier activities are relevant, as plaintiff suggests, for "context," that is, to show circumstances from which an inference of discrimination can be drawn, because on the record before me they are insufficient in any event.

Plaintiff has, in fact, adequately pled membership in a protected class, qualification for the job in question, and I assume arguendo, without deciding, that he has pled an adverse employment action. What he has not adequately pled are circumstances that support an inference of discrimination.

First, with respect to national origin discrimination, the factual context which counsel points me to is contained primarily in the April 14, 1997 memorandum where plaintiff tells his superior that he is unhappy at the company. He discusses his "gradual demotion" and his becoming

"increasingly frustrated, burnt out, and demoralized by the lack of cooperation, unreasonable demands, and constant interference by [Nicholas Papadopoulu]."

Plaintiff goes on to state that he "found [him]self systematically excluded, cut off from any further participation despite [Mr. Papadopoulo's] lack of understanding of the U.S. marketing style."

Plaintiff also states that: "It is evident that I have not only reached the 'glass ceiling' at Sorema with no prospect for further advancement, but also encountering a hostile, demoralizing, and humiliating atmosphere and constant chaos, which is counterproductive to work efforts. In view of the above, after long and thoughtful considerations, I concluded that I have no other choice but to leave the company provided that a suitable and acceptable arrangement can be reached."

Plaintiff goes on to state what he considers such suitable and acceptable arrangement, including a one-year paid leave of absence and other requirements. He concludes that memorandum by saying, "Because of the untenable work environment I wish to leave as soon as the above outlined conditions are agreed to."

At oral argument, plaintiff's counsel concedes that there was nothing in the memorandum from which an inference of age or national origin discrimination can be made. Counsel argues that the use of the words "glass ceiling" might provide such an inference. I reject that suggestion. There is nothing in the memorandum from which age or national origin discrimination can be inferred, and the use of the popularized term "glass ceiling" is not sufficient.

Indeed, granting all inferences to plaintiff, the memorandum can be characterized as nothing other than

plaintiff's dissatisfaction with his lot within the company for various nondiscriminatory reasons.

As plaintiff stated in his EEOC complaint, which I consider such since it was referred to in the amended complaint, following receipt of the April 14, 1997 memorandum, plaintiff's superiors gave him the option of either resigning or being terminated He opted to be terminated. Plaintiff also states in the EEOC charge that his superiors at the company told him that he had committed a hostile act against the company by clearing out his personal items from the office. He continues, "This all stemmed from my untenable relationship with Nicholas Papadopoulo, (a natural born French citizen of Greek heritage/age 33), executive vice president and chief underwriting officer."

Finally, both in his EEOC charge and in the amended complaint, plaintiff alleges in a conclusory fashion that he was terminated as a result of his age and national origin. Plaintiff alleges in his complaint at, among other places, paragraphs 21, 24, 26 that other, in his view, less qualified individuals were promoted beyond him and alleges at paragraph 38 that individuals fired with cause were provided severance packages, and plaintiff was denied a severance package. All of these are insufficient to raise an inference that the circumstances under which plaintiff was terminated were discriminatory.

With respect to national origin, the only mention of national origin is that plaintiff was of Hungarian descent, that other folks that were promoted were of different national origins, especially Mr. Papadapoulo, who is alleged to be a French citizen, and that there are no other Hungarians at any level within the company. These conclusory allegations are insufficient as a matter of law to raise an inference of discrimination.

With respect to age, plaintiff makes reference to a remark attributed to Mr. Papadopoulo --

MR. BRODY: Your Honor, excuse me, Mr. Chavel.

THE COURT: I'm sorry, Chavel. Thank you.

In February of 1995 or 1996, to the extent that Mr. Chavel wanted to "energize" the underwriting department. This remark was allegedly made at the time Mr. Papadopoulo, a younger man, is alleged to have assumed plaintiff's duties (amended complaint, paragraph 23). This remark is insufficient to create an inference of discrimination.

First, the remark is too vague to be considered age related, even giving all inferences in plaintiff's favor. Secondly, even if the remark were considered to be an age-related remark, it is far too remote in time and unrelated to the job action at issue. As I mentioned, the remark is alleged to have taken place in February of 1995 or February of 1996. Plaintiff's termination was in 1997, April of 1997. Accordingly, the remark was far too remote in time.

Secondly, the remark cannot be said to have been directed at plaintiff or his work activities in the manner discussed by Judge Sotomayor in Cartegna v. Ogden Services, Corp., 995 F. Supp. 459, 463 (S.D.N.Y. 1998). Accordingly, for both those reasons, the energized remark is insufficient to raise an inference of age discrimination.

With respect to the allegations that other folks were promoted who were less qualified, those allegations boil down to exactly that. Plaintiff complains that other folks who, in his view, were less qualified were promoted ahead of him, in his place, assumed his duties and the like. Such allegations are insufficient to raise an inference of discriminatory circumstances.

Finally, with respect to the severance package allegations contained at paragraph 38 of the amended complaint, the sum and substance of those allegations is that other individuals who were fired for cause received severance and plaintiff did not. In both of these circumstances, that is, the promotions and the severance, there are no facts alleged which connect those actions to age or national origin discrimination with respect to plaintiff.

Indeed, during the course of oral argument, no such facts have been discussed in response to questions regarding the severance allegations. Counsel concedes that there were no facts that add to that allegation. Accordingly, even giving all inferences to plaintiff, as I must, on a motion to dismiss, I find that plaintiff has not adequately alleged a prima facie case, in that he has not adequately alleged circumstances that support an inference of discrimination.

Accordingly, the amended complaint is dismissed. The federal claims are insufficient, and I decline to exercise supplemental jurisdiction over the state claims. Because no additional facts have been discussed, which would cure the deficiencies in the federal claim, the dismissal is with prejudice

Counsel, have I forgotten anything?

MS. BRODY: No, your Honor.

THE COURT: Thank you. Good morning, counsel.

MR.GOODMAN: Thank you, your Honor

MS. BRODY: Thank you, your Honor.

99 CIVIL 12272(LAP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AKOS SWERKIEWICZ,
Plaintiff,

-against-

SOREMA, N.A.,
Defendant

Whereas the parties having appeared before this Court and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court, on July 26, 2000, having rendered its Memo Endorsed Order dismissing the amended complaint with prejudice, it is

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memo Endorsed Order dated July 26, 2000, the amended complaint is dismissed with prejudice.

DATED: New York, New York
July 31, 2000

JAMES M. PARKISON

Clerk of Court

BY:
Deputy Clerk

Law Offices
Raynes, McCarty, Binder, Ross & Mundy
20th Floor
1845 Walnut Street
Philadephia, PA 19103
(215) 568-6190
Fax (215) 968 0618

August 2, 2000

Via Facsimile Only
Honorable Lorerta A. Preska
United States District Judge
United States Courthouse
500 Pear' Street, Room 1320
New York, NY 10007

Re: Swierkiewicz v. Sorema N.A.

Docket No. 99-CV-12272 (LAP)

Dear Judge Preska:

I write to confirm my understanding that the Court would have dismissed with prejudice Mr. Swierkiewicz's amended complaint had he sought leave to amend paragraph 38 to state that the reason defendant Sorema treated him differently than the referenced employees was on account of his age and national origin. My understanding is drawn from the Court's bench ruling at the argument held on July 6, 2000.

If my understanding is correct, I do not wish to burden the Court with a futile motion for reconsideration pursuant to Rule 59, and wish only to ensure that the record is clear for appeal.

If I am mistaken in my assumption, I respectfully request that the Court consider this letter as a motion pursuant to Rule 59 and grant plaintiff additional time to file a memorandum of law in support of the motion.

Thank you very much,

Respectfully submitted,

Harold I. Goodman

HIG/vlf
cc: Lauren Reiter Brody, Esquire (via facsimile *and first class mail)* Anne L. Clark, Esquire *(via facsimile and first cl ass mail)*

Because counsel was unable to state any additional facts to be included in an amended complaint, any amendment would be futile.

SO ORDERED

Loretta A. Preska, USDJ

August 11, 2000

No. 00-9010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AKOS SWIERKIEWICZ,
Plaintiff-Appellant,

v.

SOREMA, N.A.,
Defendant-Appellee.

March 12, 2001, Decided

COUNSEL:
APPEARING FOR APPELLANT [sic]: LAUREN REITER BRODY, Esq., Rosenman & Colin, LLP, New York, NY.

APPEARING FOR APPELLEE [sic]: HAROLD I. GOODMAN, Esq., Raynes, McCarty, Binder, Ross & Mundy, Philadelphia, PA.

JUDGES:
PRESENT: Hon. John M. Walker, Jr., Chief Judge, Hon. James L. Oakes, Hon. Guido Calabresi, Circuit Judges.

SUMMARY ORDER

Appeal from the United States District Court for Southern District of New York (Preska, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Akos Swierkiewicz appeals from an August 1, 2000 judgment of the United States District Court for the Southern District of New York (Preska, J.) granting Sorema's motion to dismiss appellant's claims of discrimination based on national origin, pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000*(e); and age discrimination, pursuant to the Age Discrimination in Employment Act of 1967, *29 U.S.C. § 626*(c)(1). On appeal, Swierkiewicz argues that the district erred in dismissing the complaint because the district court improperly applied a heightened pleading requirement and, in the alternative, if he needed to comply with a heightened pleading requirement, he has done so and that dismissal was therefore unwarranted.

Swierkiewicz, of Hungarian descent, has been a United States citizen since 1970. Defendant-appellee Sorema is a reinsurance company headquartered in New York and principally owned and controlled by a French parent company. In April 1989, Swierkiewicz, at the age of 43, began working for Sorema as a Senior Vice President and Chief Underwriting Officer. In February 1995, Francois Chavel, Sorema's President and Chief Executive Officer, shifted Swierkiewicz's job responsibilities to marketing and services and transferred the bulk of Swierkiewicz's underwriting responsibilities to Nicolas Papadopoulo, a 32-year-old French national. At the time of this transition, Chavel stated that he wanted to "energize" the underwriting department. Swierkiewicz states that over the next two years he was "isolated by Mr. Chaval excluded from business decisions and meetings and denied the opportunity to reach his true potential at Sorema."

In April 1997, Swierkiewicz wrote a memorandum to Mr. Chaval outlining these grievances and concluding that he had no choice but to leave the company providing that a suitable severance package was provided. Two weeks later, Sorema's general counsel informed Swierkiewicz that Swierkiewicz could either resign without a severance package or be terminated. Later that same day, upon Swierkiewicz's refusal to resign, Sorema fired him.

We review the district court's grant of motion to dismiss de novo. *See Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000).*

"It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." *Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978); see also, Tarshis, 211 F.3d at 35.*

To plead discrimination based on national origin, a plaintiff must allege (1) membership, (2) qualification for the job in question, (3) an adverse employment action and (4) circumstances that give support to an inference of discrimination. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).* With respect to national origin, the only circumstances Swierkiewicz pled are that he is Hungarian, others at Sorema are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the district court that these allegations are insufficient as a matter of law to raise an inference of discrimination.

To plead discrimination based on age, a plaintiff must allege that (1) he is in the protected age group, (2) he is qualified for the job, (3) he was discharged and (4) the discharge occurred under the circumstances giving rise to an inference of age discrimination. *See Hollander v. American Cyanamid Co., 172 F.3d 192, 198* (2d Cir.), *cert. denied, 528*

U.S. 965 (1999). The only circumstance that Swierkiewicz alleges gives rise to an inference of age discrimination is Chavel's comment in 1995 that Chavel wanted to "energize" the underwriting department. We agree with the district court that this allegation is insufficient as a matter of law to raise an inference of discrimination.

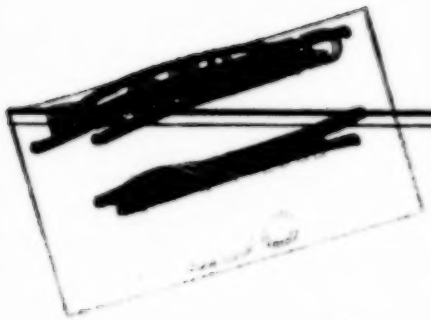
We have considered Swierkiewicz's remaining arguments and consider them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the district court.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

By:

/s/ Lucille Carr, Deputy Clerk



No. 00-1853

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

—v.—

SOREMA, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

LAUREN REITER BRODY
(Counsel of Record)
FRANCES KULKA BROWNE
ROSENMAN & COLIN LLP
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(212) 940-8800

Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a plaintiff alleging national origin and age discrimination is required to plead factual allegations which raise an inference of discrimination in order to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

CORPORATE DISCLOSURE STATEMENT

Respondent Sorema, N.A. is wholly owned by SCOR U.S. Corp., a privately held company.

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STATEMENT OF THE CASE

Petitioner brought this discrimination action alleging that his employment had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and his age in violation of the Age Discrimination in Employment Act of 1967 (the "ADEA"). The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because petitioner offered only conclusory allegations and did not allege any facts indicating that the termination of his employment was discriminatory. The court of appeals affirmed.

The complaint alleged that Sorema, N.A. ("Sorema") was a New York-based reinsurance company that was formed in 1989. Petitioner was hired in April of 1989 as a senior vice president. At the time, petitioner, who was of Hungarian descent, had been a United States citizen for almost 20 years and was 42 years old. Sorema's chief executive officer was François M. Chavel, a French national who was petitioner's age. (J.A. 20a, 24a, ¶¶ 5, 6, 12, 13, 14, 17).

The complaint further alleged that in February 1995, Mr. Chavel made changes at Sorema that affected petitioner's job responsibilities. Certain of petitioner's underwriting responsibilities were transferred to Nicholas Papadopoulo, a 32-year-old French national of Greek heritage, and petitioner was given additional marketing and services responsibilities. At the time of the transition, Mr. Chavel stated that he wanted to

"energize" the underwriting department. (J.A. 20a-21a, 25a, ¶¶ 19, 23).

The complaint further alleged that more than two years later, in April 1997, petitioner wrote a memorandum to Mr. Chavel outlining his grievances with the company. In the memorandum, petitioner complained about his difficulties in working with Mr. Papadopoulo and other employees, and his dissatisfaction with the company. Petitioner concluded that "[b]ecause of the untenable work environment", he had "no other choice but to leave the company", and demanded a severance package. The memorandum did not complain about any discrimination against petitioner, nor did it mention petitioner's national origin or age. After sending the memorandum to Mr. Chavel, petitioner "cleared out" all of his personal belongings from his office. (J.A. 20a, 26a, 34a-36a, ¶ 31).

The complaint further alleged that as a result of petitioner's "hostile" actions, Mr. Chavel gave petitioner the choice of resigning or having his employment terminated. Petitioner "opted to be terminated" and, consequently, his employment ended on April 29, 1997. (J.A. 20a, 33a, ¶¶ 33-35).

In July 1997, petitioner filed a charge of discrimination, based solely on the termination of his employment, with the Equal Employment Opportunity Commission (the "EEOC") (J.A. 18a-21a).

In August 1999, petitioner commenced this action for national origin discrimination under Title VII and for age discrimination under the ADEA in

connection with the termination of his employment (J.A. 4a-12a).

Sorema moved to dismiss the complaint, pursuant to Rule 12(b)(6), on the grounds that petitioner's claims (i) were barred by the statute of limitations, and (ii) failed to state a claim upon which relief can be granted (J.A. 13a-14a).

In response to Sorema's motion, petitioner filed an amended complaint that added claims under the New York State and City anti-discrimination laws. The amended complaint was otherwise identical to the complaint.[1] (J.A. 22a-30a).

At the oral argument of the motion to dismiss, petitioner's counsel agreed that petitioner's claims were based only on his April 1997 termination of employment. The district court ruled that petitioner had failed to state a claim for relief in that he "ha[d] not adequately alleged circumstances that support an inference of discrimination" (J.A. 38a, 42a).

After entry of the district court's judgment, petitioner's counsel sought to amend his complaint, and add another conclusory allegation. The court responded that "[b]ecause counsel was unable to state any additional facts . . ., any amendment would be futile". (J.A. 45a).

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[1] All references to the "complaint" include both the initial complaint and the amended complaint, since their substantive allegations are the same.

The court of appeals affirmed. The court stated that "a complaint consisting of no more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)". The court found that petitioner had not pled circumstances that would raise an inference of discrimination, and that such requirement did not constitute a form of heightened pleading. (J.A. 48a-49a).

SUMMARY OF ARGUMENT

In this case, the Court must decide whether a plaintiff who could not allege any factual basis for his discriminatory discharge claims and who admitted that he needed discovery in order to state a claim should be permitted to proceed further. As held by both the court of appeals and the district court, the answer, clearly, is no.

Petitioner's claims were dismissed pursuant to Rule 12(b)(6). His complaint asserted, in wholly conclusory terms, that Sorema terminated his employment because he was Hungarian and because he was 50 years old. However, the factual allegations in the complaint did not support petitioner's conclusion, and showed that discrimination had nothing to do with the termination of petitioner's employment.

Petitioner would like to use the federal anti-discrimination laws against Sorema. Those laws do not prevent an employer from terminating the employment of an employee who admits he is "burnt out" and has no interest in working for it any longer. The Federal Rules provide for the prompt

dismissal of precisely this type of case -- where the facts, taken as true, do not show that the plaintiff is entitled to relief. Petitioner would ignore his factual allegations and rely on his ultimate legal conclusion -- in effect, eviscerating Rule 12(b)(6) in employment discrimination cases, and permitting such cases to proceed to discovery simply because the plaintiff invokes the magic word, "discrimination", in the complaint.

The Federal Rules require a complaint to set forth allegations showing that the plaintiff is entitled to relief. *See* Fed. R. Civ. P. 8(a) (a pleading should contain "a short and plain statement showing that the pleader is entitled to relief"); Fed. R. Civ. P. 12(b)(6) (a complaint may be dismissed "for failure to state a claim upon which relief can be granted"); *see also* Fed. R. Civ. P. 1 (The Rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action"). The language of the rules is clear -- a plaintiff must make a showing that he is entitled to relief in order to survive a motion to dismiss. Petitioner's complaint did not make any such showing.

In a discriminatory discharge case under Title VII and the ADEA, a plaintiff must put forth some allegations showing that there was discrimination in connection with termination of his employment. The *prima facie* case articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), provides an appropriate guideline by which to assess the sufficiency of a discrimination complaint. On a Rule 12(b)(6) motion to dismiss, the *prima facie* case does not require evidence or

proof, but only minimal allegations supporting an inference of discrimination. As such, it is not a rigorous or heightened pleading standard. However, there must be some reason to infer discrimination. Petitioner's complaint presented no such reason.

Because an inference of discrimination is not difficult to show, a plaintiff does not need discovery. The Federal Rules do not contemplate pre-action discovery in order to permit a plaintiff to find a claim. Moreover, prior to commencing an action, a Title VII and ADEA plaintiff already has had the benefit of an investigation by the EEOC.

Compelling a plaintiff who claims discrimination to meet a minimum pleading standard accords with the policies behind Title VII and the ADEA. Federal courts are inundated with employment discrimination claims, and the numbers are increasing. Dissatisfied employees, like petitioner, frequently bring claims of discrimination that have no merit. This adversely affects employers and their employees, who must defend themselves; the courts, which must adjudicate such claims; and employees with legitimate claims, who deserve prompt justice.

ARGUMENT

I

THE FEDERAL RULES REQUIRE THE COMPLAINT TO SHOW THAT THE PLEADER IS ENTITLED TO RELIEF

The plain language of the Federal Rules as well as the history behind them make clear that a pleading must contain some information showing

that the plaintiff is entitled to relief. The Rules mandate dismissal of complaints, including complaints alleging a violation of the federal anti-discrimination laws, where, as here, the plaintiff offers only conclusory allegations of wrongdoing and the facts did not show any violation. This is not a heightened pleading standard, as petitioner asserts (Pet. Br.13), but rather the ordinary application of well-settled pleading rules.

A. The Plain Language And History Of The Federal Rules Require A Plaintiff To Show An Entitlement To Relief.

Rule 8(a) calls for a "short and plain statement *showing* that the pleader is entitled to relief" (emphasis added). Likewise, Rule 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted". These Rules mean what they say: a plaintiff must state a claim showing that he is entitled to relief.

The language of the Rules is the primary, and most reliable, indicator of their meaning. This Court has recognized that, "'[w]e give the Federal Rules of Civil Procedure their plain meaning'. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous". *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991) (citation omitted).[2]

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[2] The plain meaning rule is an elementary canon of textual interpretation and provides that, "[w]ords should be read as saying what they say". *Black's Law Dictionary* (7th ed.

(Continued...)

According to the clear and unambiguous language of these Rules, a pleading must contain some "showing" that the plaintiff is "entitled to relief". Fed. R. Civ. P. 8(a). It is not enough for a complaint merely to announce its ultimate conclusion or to affix such conclusion to a set of inefficacious facts. Rather, a complaint must make a threshold showing sufficient to "state a claim upon which relief can be granted". Fed. R. Civ. P. 12(b)(6). If it does not, the complaint should be dismissed.

Legal scholars agree that a plaintiff must show an entitlement to relief. Professors James, Hazard and Leubsdorf point out that if this threshold showing is not required, then "[i]t would have been more appropriate to require only that the pleading state that there is 'reason to believe that, upon evidence which may be disclosed by discovery, the pleader may be entitled to relief". Flemming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* § 3.6, at 189 (5th ed. 2001). Of course, the Rules say no such thing.

Petitioner wholly ignores Rule 12(b)(6), as well as the part of Rule 8(a) providing for a "showing that the pleader is entitled to relief". He focuses only on the "short and plain statement", and argues that "the goal of Rule 8(a)(2) is simplicity of pleadings" (Pet. Br. 14). "Simplicity" does not mean that basic pleading standards do not apply. The Rule compels a plaintiff to set out his facts plainly and directly,

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1999) at 1170.

but also requires a showing of the grounds on which the claim rests. This is where petitioner's complaint, notwithstanding its length, failed.

The historical development of pleading under the Federal Rules illuminates their plain meaning. Prior to the adoption of the Federal Rules in 1938, federal district courts in civil actions applied the procedural rules of the state in which they were located. *See* Conformity Act of 1872, c. 255 § 5, 17 Stat. 197; Rev. Stat. § 914. Some states employed pleading standards developed at common law, which mandated the inclusion of highly-stylized and formulaic language in complaints. Other states used code pleading pursuant to which a complaint had to allege facts and could not allege claims, causes of action or legal conclusions. Still other states adopted some hybrid of these methods. *See generally* Charles E. Clark, *Handbook Of The Law Of Code Pleading*, 23-31 (2d ed. 1947). There was significant variation and confusion in federal pleading.

The fundamental problem with these methods was that purely technical defects or missteps in pleading would lead to dismissal of complaints. The Federal Rules were designed to remedy this problem as well as to simplify, and bring consistency to, federal pleading. *See* 1955 Report Of The Advisory Committee Proposed Amendments To The Rules of Civil Procedure For The United States District Courts, *reprinted in* 12A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2001), App. F., note to Rule 8(a)(2) ("[T]he rules are designed to discourage battles over mere form of statement and to sweep away the needless

controversies which the codes permitted, that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement"); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome").

Petitioner does not contend that his complaint was dismissed on a technicality or because of a mistake by his attorneys. His argument is that the courts below, in looking for some facts that would support an inference of discrimination and in not deferring to his "naked assertions", improperly returned to former practice (Pet. Br. 19). This argument is incorrect because the Federal Rules were not intended to, and do not, relieve a plaintiff from the threshold requirement of alleging some non-conclusory information that would support a cognizable legal theory. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1202, at 72 (2d ed. 1990). ("[T]he rules do contemplate that the pleadings will refer to the occurrences sued upon and that they will show that the pleader has a claim on which he is entitled to relief. Federal civil pleading differs from the 'fact pleading' of the codes principally in the degree of generality with which the elements of the claim may be stated"); Jack B. Weinstein & Daniel H. Distler, *Comments On Procedural Reform*, 57 Columb. L. Rev. 518, 523 (1957) ("[T]he allegations made must indicate some probability that the transaction, if it occurred as stated, supports a right to legal relief").

The principal architect of the Federal Rules, Charles E. Clark, made the same point describing common law and code pleading as extremes, and characterizing pleading under the Federal Rules as "giving some facts", so as to present "a very broad issue". Clark, *supra*, at 56.

The drafters of the Federal Rules understood that the Rules required a plaintiff to provide "some facts". In 1952, the Advisory Committee on the Federal Rules was presented with an amendment that would have added to the "short and plain statement of the claim", a requirement that it "contain the facts constituting a cause of action". 5 Wright & Miller, *supra*, § 1216, at 164–65.[3] The proposal was rejected -- not because it was unsound -- but because it was unnecessary in that Rule 8(a) already called for factual information. The Advisory Committee explained that the proposed amendment

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[3] The proposed amendment was, in part, a misplaced response to *Dioguardi v. Durning*, 139 F.2d 774, 774-75 (2d Cir. 1944), which upheld a *pro se* plaintiff's "obviously home drawn" and inartfully drafted complaint. Like petitioner (Pet. Br. 15), "[s]ome of the critics have read the *Dioguardi* case as meaning that a pleader no longer need set forth facts from which it can be seen that he has a right to relief". 5 Wright & Miller, *supra*, § 1220, at 197. The Advisory Committee disagreed, and recognized that *Dioguardi* was not based on any such holding. To the contrary, "the complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading". Advisory Committee Report, *reprinted in* 12A Wright & Miller, *supra*, App. F at 773.

> appear[s] to be based on the view that the rule does not require the averment of any information as to what actually has happened. That Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated . . . It is accordingly the opinion of the Advisory Committee that, as it stands, the rule . . . requires the pleader to disclose adequate information as to the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.

Advisory Committee Report at 773-74.

Thus, the plain language and history of the Federal Rules demonstrate that a minimal threshold showing, with some facts to support an entitlement to relief, is necessary in order to survive a Rule 12(b)(6) motion to dismiss.

B. Courts Dismiss Complaints Consisting Of Conclusory Allegations That Do Not Show An Entitlement To Relief.

This Court applied Rules 12(b)(6) and 8(a) in the landmark case of *Conley v. Gibson*, 355 U.S. 41 (1957). There, the Court considered the sufficiency of a class action complaint asserting that the Union had failed, in violation of the Railway Labor Act, to "represent Negro employees equally and in good faith". *Id.* at 43. The plaintiffs alleged that they were wrongfully discharged, that their jobs were filled by white employees, and that the Union refused to protect their jobs as it protected jobs of

white employees, or to help plaintiffs with their grievances, all "because they were Negroes". *Id.* at 46.

The defendants moved to dismiss the complaint on the ground that the plaintiffs had not set forth "specific facts", such as the precise provisions of the collective bargaining agreement which allegedly had been violated, the precise duties or obligations allegedly owed by the Union, and the precise actions allegedly taken by the Union to deprive the plaintiffs of their rights. *Conley* Resp. Br. at 7.

The Court rejected any requirement that such "specific" and "detailed" information need be provided. Relying on Rule 8(a), and its directive that a plaintiff give a "short and plain statement of the claim" *and* the "grounds upon which it rests" (355 U.S. at 47), the Court concluded that "[i]f [the plaintiffs'] allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination". *Id.* at 46.[4]

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[4] The Court characterized this as "simplified notice pleading". 355 U.S. at 47. "Such a label, however well meant, is unfortunate. At best it leads to confusion, for there is no accepted understanding of what the term means, and persons relying on the label are likely to substitute their own varying interpretations of it for the more precise formulations of the federal pleading rules. At worst it has caused unnecessary criticism of the rules from those to whom the label suggests the brief and uninformative notice of an action that commonly is used at the outset of proceedings in small claims courts . . . (Continued...)

In accordance with the Federal Rules and *Conley*, the courts of appeals have unanimously held that, while the Federal Rules do not mandate the pleading of specific or detailed information, they do "require[ ] the pleader to disclose adequate information regarding the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it". 5 Wright & Miller *supra*, § 1202, at 73, *citing Advisory Committee Report*. Complaints that do not show a plaintiff's entitlement to relief, but merely rely upon bare conclusions or facts that do not support such conclusions, are inadequate in every circuit. *See, e.g., DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition"); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice"); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss"); *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d

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If a label is needed to distinguish pleading under the rules from that of the codes and the common law, 'modern pleading' or 'simplified pleading' would be more appropriate". 5 Wright & Miller, *supra*, § 1202 at 72-73.

321, 326 (4th Cir. 2001) ("Rule 12(b)(6), however, is not without meaning. 'The presence[ ] of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint' cannot support the legal conclusion"); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) ("In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations. We will thus not accept as true conclusory allegations or unwarranted deductions of fact"); *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 779 (6th Cir. 2000) ("To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory . . . [M]ore than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements"), *cert. denied*, 531 U.S. 1145 (2001); *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) ("At a minimum, a complaint must contain facts sufficient to state a claim as a matter of law, and mere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss"), *cert denied*, 525 U.S. 930 (1998); *Briehl v. GM Corp.*, 172 F.3d 623, 627 (8th Cir. 1999) ("At the very least, however, the complaint must contain facts which state a claim as a matter of law and must not be conclusory"); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss"); *Witt v. Roadway Exp.*, 136 F.3d 1424, 1431 (10th Cir.) ("Without an allegation of some factual occurrence that could

[conceivably] constitute [the claim], the claim must be dismissed"), *cert. denied*, 525 U.S. 881 (1998); *South Florida Water Management Dist. v. Montalvo,*, 84 F.3d 402, 409 n.10 (11th Cir. 1996) ("[C]onclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss"); *Andrx Pharms., Inc. v. Biovail Corp., Int'l*, 256 F.3d 799, 805 (D.C. Cir. 2001) ("'[T]he court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations'").[5]

To be sure, in assessing a complaint, a court should read the complaint liberally and accept its well-pleaded factual allegations as true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Moreover, civil rights complaints are subject to the

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[5] The commentators uniformly agree. *See, e.g.*, 2 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 12.34[1][b], at 12-61 to 12-63 (3d ed. 2000) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss . . . The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 340 (2d ed. 1990) ("[T]he pleader must set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist"); James, Hazard, & Leubsdorf § 3.6, *supra*, at 189 ("If the traditional threshold requirements were not to apply . . . it is difficult to see why the pleading should be required to show that the 'pleader is entitled to relief'").

same standards as other complaints, and there is no requirement of heightened pleading. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). These principles are well-settled and are not at issue in this case.

Petitioner erroneously characterizes the standard employed by the courts below as "heightened" or "strict special" pleading (Pet. Br. 13, 14). The courts did not impose any such standard and did not require plaintiff to plead the details, particulars or specifics of his claim. They merely looked for an allegation that would indicate that discrimination had something to do with the termination of petitioner's employment.

Petitioner also errs in maintaining that conclusory allegations are enough and that "a plaintiff has the duty -- but no more than that is required -- to put the defendant on notice of the nature of his action" (Pet Br. 11). Notice as to the "nature of the action" is, of course, only part of what the Federal Rules mandate. The other part of the Federal Rules, which petitioner overlooks, is that there must be notice of "the grounds upon which [the claim] rests". *Conley*, 355 U.S. at 47. This is precisely where petitioner's complaint failed -- it did not allege any non-conclusory grounds showing that he was entitled to relief.

Dismissal of petitioner's complaint is consistent with this Court's decisions. This Court, too, has refused to accept conclusory allegations and has dismissed discrimination claims where the facts, as alleged, do not show an entitlement to relief. In *Sutton v. United Air Lines, Inc.*, 527 U.S.

471 (1999), the Court looked beyond the conclusory allegation that the plaintiffs were "disabled" within the meaning of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, and dismissed a discrimination complaint on a Rule 12(b)(6) motion. In doing so, the Court affirmed the court of appeals' decision, which held that, "to state a *prima facie* case and survive [the employer's] motion to dismiss, Plaintiffs' vision, in its corrected state must 'substantially limit' their major life activity of seeing. Plaintiffs cannot make this *showing*". *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) (emphasis added), *aff'd*, 527 U.S. 471 (1999). The Court required the plaintiffs to make viable factual allegations, and did not defer to the complaint's ultimate conclusions.

Thus, a complaint cannot proceed on conclusory allegations alone and must state some facts to support the claim. That petitioner included "five paragraphs in the amended complaint explicitly averring that [he] was fired by Sorema on account of his national origin and age" (Pet. Br. 4) is of no significance whatsoever. Conclusory allegations -- even those repeated five times -- do not state a claim.

II

A DISCRIMINATION COMPLAINT MUST ALLEGE CIRCUMSTANCES SUPPORTING AN INFERENCE OF DISCRIMINATION

In assessing the legal sufficiency of a complaint, a court necessarily must consider the substantive law governing the claim. The court of appeals properly turned to this Court's decision in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as a guidepost to determine whether plaintiff was able to state a claim for relief under the anti-discrimination statutes.

The complaint alleged that petitioner's employment was terminated in violation of (i) Title VII, which renders it unlawful "for an employer . . . to fail or refuse to hire or to discharge . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. § 2000e-2(a)(1)), and (ii) the ADEA, which prohibits discrimination against employees over forty with respect to their "compensation, terms, conditions, or privileges of employment" (29 U.S.C. § 623(a)(1)) (J.A. 22a).[6]

Petitioner sought to proceed with a circumstantial case of discrimination under the now-familiar framework set forth in *McDonnell Douglas* and its progeny. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).[7]

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[6] Petitioner's New York State and City claims are governed by the same standards as his federal claims. *See Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d Cir. 1999).

[7] Federal courts have consistently used *McDonnell* (Continued...)

Under this framework, a plaintiff must first set forth a *prima facie* case of discrimination. If he does so, the employer is required to articulate a legitimate, nondiscriminatory reason for the adverse job action. The plaintiff must then show that the employer's proffered reason is untrue and is instead a pretext for intentional discrimination. *See Reeves*, 530 U.S. at 142-43.

In *McDonnell Douglas*, which involved a claim by the plaintiff that he was not hired because of his race, the Court held that a *prima facie* case could be established by showing:

> (i) that the plaintiff belonged to a racial minority;
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected; and
>
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Douglas in analyzing age discrimination claims. *See Reeves*, 530 U.S. at 141-42; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 n.2 (1996). This Court has assumed, without deciding, that the *McDonnell Douglas* framework applies to claims under the ADEA. *See Reeves*, 530 U.S. at 142; *O'Connor*, 517 U.S. at 311.

McDonnell Douglas, 411 U.S. at 802.

Since *McDonnell Douglas*, the *prima facie* elements have been refined to apply to differing factual situations in which a plaintiff alleges employment discrimination. The most common and generalized formulation is the one used by the court of appeals:

> (i) membership [in a protected group];
>
> (ii) qualification for the job in question;
>
> (iii) an adverse employment action; and
>
> (iv) circumstances that give support to an inference of discrimination.

(J.A. 48a).[8]

As shown below, the court of appeals was correct to look to *McDonnell Douglas* for guidance in assessing the sufficiency of petitioner's complaint. In so doing, the court did not hold petitioner to all of the elements of his case, which would include a showing of pretext. The court did not even hold petitioner to all of the elements of his *prima facie* case but rather confined its inquiry to the fourth

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[8] There can be no doubt that this formulation accords with *McDonnell Douglas*. *See O'Connor*, 517 U.S. at 312 (recognizing that the *prima facie* case requires information "*adequate to create an inference that an employment decision was based on an illegal discriminatory criterion*"); *Burdine*, 450 U.S. at 253 (noting that *prima facie* case entails "circumstances which give rise to an inference of unlawful discrimination").

prong, which is the essence of any discrimination claim (J.A. 48a). This lenient application of the *prima facie* standard -- which is itself *de minimis* -- is correct on a motion to dismiss.

A. The *Prima Facie* Elements Are Considered On A Motion To Dismiss An Employment Discrimination Claim.

Contrary to petitioner's assertion (Pet. Br. 18), courts properly refer to the *prima facie* criteria in determining the adequacy of a complaint on a motion to dismiss pursuant to Rule 12(b)(6).

This Court has done so. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court assessed the sufficiency of an employment discrimination complaint under Rule 12(b)(6). The complaint alleged that:

> On September 26, 1970, petitioners, both white, and Charles Jackson, a Negro employee of Santa Fe, were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze which was part of a shipment Santa Fe was carrying for one of its customers. Six days later, petitioners were fired by Santa Fe, while Jackson was retained.

427 U.S. at 276. The employer moved to dismiss on the grounds that these allegations failed to state a claim and that the "petitioners were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee". *Id.* at 283,

n.11. The Court rejected this argument, and relied upon *McDonnell Douglas* in holding that the "precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against (the employer) of comparable seriousness . . . were nevertheless retained . . .' is adequate to plead an inferential case" (*id.*). *See also id.* at 282 ("We find this case indistinguishable from *McDonnell Douglas*").[9]

Santa Fe makes clear that circumstances giving rise to an inference of discrimination must be alleged in a discrimination complaint in order to survive a motion to dismiss. *Santa Fe* also teaches that this standard, grounded in *McDonnell Douglas*, is not an onerous or heightened one. The *Santa Fe* plaintiffs, unlike petitioner, satisfied the standard in a few sentences -- alleging that they were discharged for engaging in the same type of activity as a black employee who was retained. The complaint here, which is considerably more prolix, did not identify any similarly situated employees who were retained while petitioner was let go.

In *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980), the Court also dismissed a

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[9] The employer also argued that the complaint should be dismissed because "the principles of *McDonnell Douglas* are inapplicable where the discharge was based . . . on participation in serious misconduct or crime directed against the employer" (*id.* at 283). The Court rejected this argument as well, and held that the principles of *McDonnell Douglas* are applicable on a motion to dismiss.

discrimination complaint on a Rule 12(b)(6) motion where the plaintiff's allegations did not raise an inference of discrimination. In *Ricks*, a college professor alleged that he was denied tenure and then discharged because of his national origin. The Court found that the allegations concerning the plaintiff's discharge were insufficient to state a claim because "nothing in [them] alleges *any fact suggesting discrimination* in the termination of [the plaintiff's] employment". *Id.* at 257 n.8 (emphasis added). The Court concluded there was no inference of discrimination, even though, as it noted, "[s]ixteen paragraphs in the complaint describe in detail the sequence of events surrounding the tenure denial. Only one paragraph even mentions Ricks' eventual departure". *Id.* at 257 n.8.

So too, petitioner's claim that his "nine page amended complaint" (Pet. Br. 5) contained enough facts misses the point. It is not the number, but rather the substance, of the allegations that determines whether a complaint is adequate.

This Court's use of *McDonnell Douglas* in assessing the sufficiency of a complaint shows that petitioner's position is incorrect. The *prima facie* case is not merely an evidentiary standard (Pet. Br. 18). To the contrary, the *prima facie* case provides important guidance on a motion to dismiss in determining whether the facts, as alleged, state a viable claim of discrimination. *See* John F. Buckley, Michael R. Lindsay, *Defense Of Equal Employment Claims* § 17.09, at 17-12 to 17-13 (2d ed. 1995) ("The plaintiff's failure to allege a prima

facie case in the complaint provides [an] avenue for a motion to dismiss").

The courts of appeal also employ the *McDonnell Douglas prima facie* case on a Rule 12(b)(6) motion, or look for some other nonconclusory showing of discrimination. For example, in *Jackson v. City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999), the court looked to *McDonnell Douglas* to dismiss a complaint that "failed to allege that [the plaintiff] suffered an adverse employment action (the third prong) and also failed to establish that similarly situated non-minority employees were treated differently (the fourth prong)". *See also Brown v. Coach Stores, Inc.*, 163 F.3d 706, 709-10 (2d Cir. 1998); *Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

None of petitioner's cases eliminate the requirement that a plaintiff "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests", as required by *Conley*. *See* Pet. Br. 18-19. As explained by the Ninth Circuit in *Ortez v. Washington*, 88 F.3d 804, 808 (9th Cir. 1996), "a plaintiff need not make a *prima facie* showing to survive a motion to dismiss *provided he otherwise sets forth a short and plain statement of his claim showing that he is entitled to relief*" (emphasis added). That a plaintiff must make some showing of discrimination obviously comports with the pleading standards set by Congress and the courts, and applied in the case at bar.

It is also significant, as petitioner points out (Pet. Br. 17), that the EEOC requires that a charge filed with it provide a "clear and concise statement

of the facts, including pertinent dates, *constituting* the alleged unlawful employment practices". 29 C.F. R. § 1626 8(a)(3) (emphasis added). Petitioner (and the EEOC, through its *amicus* participation in this case) would deny this same information to a defendant in federal court.

Likewise, model forms for discrimination complaints contain allegations upon which a court may infer discrimination. *See, e.g.*, 2 Bender's *Federal Practice Forms*, Form No. 8:381 (1991); *Id.*, Form No. 8:401; 9 Lex Larsen, *Employment Discrimination*, Practice Forms, Form IV-8 (2d ed. 1998).[10]

Thus, an inference of discrimination must arise from the factual allegations of a complaint in order for it to state a claim and survive a motion to dismiss.

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[10] Petitioner relies on a form complaint alleging the negligent operation of a motor vehicle (Pet. Br. 16). This form is inapposite. When a car injures an individual crossing the street, there is good reason to infer that it was operated negligently. By contrast, when an at-will employee is discharged, there is no reason to infer that he was discriminated against. This is why further information must be alleged. *See* Flemming James Jr., Geoffrey C. Hazard Jr., John Leubsdorf, *Civil Procedure* § 3.11, at 203 (5th ed. 2001) ("Another factor . . . is the extent to which a party's claim of what happened deviates from what usually happens . . . The party who claims the unusual occurrence can be required to plead it affirmatively so that the usual assumptions may be indulged as a matter of course when there is no such unusual circumstance").

B. A *Prima Facie* Case Is Flexible And Not Onerous.

The *prima facie* elements, of which the inference of discrimination is most critical, do not create an elevated pleading standard but provide a sound means to evaluate a discrimination claim. A plaintiff's failure to meet this minimal standard, and allege a reason to infer discrimination shows -- most clearly -- that he cannot state a claim.

The very term "*prima facie*" connotes a low threshold of information. *See The Oxford English Dictionary* 470-71 (2d ed. 1989) (defining "*prima facie*" as: "[a]t first sight; on the face of it; as appears at first without investigation; arising at first sight; based or founded on the first impression"); *Webster's Collegiate Dictionary* 925 (10th ed. 1996) (defining "*prima facie*" as: "at first view; on the first appearance").

Consistent with the term's dictionary definition, the *prima facie* case was developed so that it would be fairly easy for a plaintiff to state. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253 ("The burden of establishing a *prima facie* case of disparate treatment is not onerous"); *Patterson v. McLean Credit Union*, 491 U.S. at 164 (same).

Moreover, the elements of a *prima facie* case are flexible and can be adapted to conform to the facts of a case. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic"). The inquiry is guided by the ultimate issue: whether any of the

circumstances alleged by the plaintiff support an inference of discrimination. *See Id.* at 579-80 ("[W]e infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations").

Petitioner's contention that he was subjected to a more rigorous pleading standard is belied by the decisions below. Both the court of appeals and the district court viewed the *prima facie* case in a manner most favorable to petitioner. They accepted the factual allegations of the complaint, drew all reasonable inferences in petitioner's, and even considered allegations outside of the limitations period (J.A. 38a-39a, 47a-48a).[11] Moreover, the courts assumed the existence of one element, an adverse job action, over Sorema's objection that this element was not alleged because petitioner had effectively resigned. *See* J.A. 48a; 38a. Had the *prima facie* criteria been strictly applied, petitioner's claim should have been dismissed for this reason as

[11] In a further effort to find some basis to sustain petitioner's complaint, the district court also looked at petitioner's April 1997 memorandum and his EEOC charge. Such documents, which are identified by a plaintiff in, and are integral to, the complaint may be regarded on a motion to dismiss. *See* 2 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 12.34[2], at 12-69 to 12-70 (3d ed. 2000) ("The courts may consider . . . [u]ndisputed documents alleged or referenced in [the] complaint" in deciding whether to dismiss it).

well.[12] Thus, petitioner was not held to all the elements of a *prima facie* case under *McDonnell Douglas*. Instead, the courts below focused on the more significant defect and ultimate issue -- petitioner's failure to allege anything from which discrimination could be inferred.

An inference of discrimination may arise in any number of ways. For example, it may be shown where an employer accords favored treatment to similarly situated employees outside of the protected class (*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11); seeks applicants with the plaintiff's qualifications to fill the plaintiff's position after he was discharged (*McDonnell Douglas*, 411 U.S. at 802); or criticizes the plaintiff or other employees in terms derogatory of the plaintiff's protected class (*Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir.), *cert. denied*, __ U.S. __, 122 S. Ct. 460 (2001)).

Petitioner did not allege *any* of these circumstances. Instead, his complaint admitted that he had precipitated his own separation from

[12] When an employee resigns, he cannot assert that he suffered an adverse employment action. *See Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999). Courts look to state law in determining whether an employee's actions constitute a resignation under the federal anti-discrimination statutes. *Id.* In this case, a New York state appellate court had already determined that petitioner's "unemployment as of April 29, 1997 was caused by his own actions in voluntarily leaving his employment". *In re Swierkiewicz*, 254 A.D.2d 596, 597, 678 N.Y.S. 2d 812, 813 (3d Dept. 1998).

the company by sending an intemperate memorandum to the president of the company and tendering his resignation. Thus, petitioner failed to come forward with any basis to believe "that in the absence of any other explanation it is more likely than not that [Sorema's] actions were bottomed on impermissible considerations". *Furnco Constr. Corp.*, 438 U.S. at 579-80.[13] Failure to satisfy this minimal standard -- which does not call for "evidence" of pretext or any other proof -- warrants dismissal of petitioner's complaint.

C. A Plaintiff Does Not Need Discovery To Allege An Inference Of Discrimination.

In apparent recognition of his failure to state a claim of discrimination, petitioner argues that he must have, but was precluded from taking, "discovery *necessary* to establish such a case" (Pet. Br. 23; emphasis added). Petitioner proposes that a plaintiff be permitted to bring suit against his employer based on mere speculation that he may have been discriminated against, and then use federal discovery devices to see whether there is any basis for his speculation. This approach is not countenanced by the Federal Rules, and reflects a

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[13] The court of appeals did not require that petitioner's complaint identify all of the circumstances supporting an inference of discrimination. The court, and the district court before it, looked at all of the circumstances alleged by petitioner and found that none of them supported any such inference as a matter of law (J.A. 48a-49a). There was no requirement that petitioner allege everything; all he had to do was allege something.

misunderstanding of the proper role of pleadings and discovery in discrimination actions.

First, to state a claim, a plaintiff is only asked to describe *his* perception of the circumstances (which is then taken as true) from which an inference of discrimination may be drawn. This information is not in the possession of the employer. The plaintiff himself must have a good faith basis for his discrimination claim prior to instituting suit, even if the facts can only be alleged upon "information and belief". Fed. R. Civ. P. 11(b)(3).

Further, a plaintiff claiming a violation of Title VII and the ADEA has superior access to information before filing a complaint than do other private litigants. This is because such a plaintiff must file a charge with the EEOC and obtain a "right to sue letter" prior to commencing his action. 42 U.S.C. 2000e-5(b); 29 U.S.C. § 626(d). When a charge has been filed, an investigation "shall be made by the [EEOC]". 29 C.F.R. § 1601.15(a). In the course of the investigation, the EEOC "may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate". *EEOC: Federal Laws Prohibiting Job Discrimination: Q&A*, http://www.eeoc.gov /facts/qanda.html.

The results of the investigation are also available to a plaintiff through the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* *See* 29 C.F.R. § 1610.7(a)(4) (providing that individuals may

obtain from the EEOC "[m]aterials in field office investigative files related to charges under: Title VII [and] the [ADEA]"). The EEOC must respond to the plaintiff's request within "20 working days after receipt of the request". 29 C.F.R. § 1610.9(a).

Here, the EEOC's investigation resulted in the dismissal of petitioner's charge (J.A. 18a-21a). The EEOC stated that, "[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained establishes a violation of the statutes". *EEOC Dismissal And Notice Of Rights; see also* J.A. 23a, ¶ 9. Petitioner, who was represented by counsel, had access to the EEOC's investigative files. His assertion that he did not "ever have the chance to discover Sorema's reason for his employment termination" is wrong (Pet. Br. 22).[14]

More to the point, however, is that Sorema's legitimate, nondiscriminatory reason had no bearing on petitioner's inability to plead a *prima facie* case.[15] None of the materials that petitioner purports to seek, his "personnel file or the files and records of

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[14] There is no mystery about the circumstances of petitioner's departure; petitioner alleged them in his complaint.

[15] Satisfying the minimal *prima facie* elements does not entail alleging the employer's reason for the adverse employment action, nor does it require an allegation that the reason is a pretext for discrimination. These matters -- unlike the elements of a *prima facie* case -- are reserved for discovery, and summary judgment or trial. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

other employees" (Pet. Br. 22), had anything to do with petitioner's own grounds for believing he was discriminated against and commencing the action.

In addition, the Federal Rules do not permit the type of discovery that petitioner would have -- discovery in order to find out if he has a claim. *See* 8 Charles Alan Wright, Arthur R. Miller et al., *Federal Practice & Procedure* § 2071, at 651 n.5 (2d ed 1994) ("The type of fishing which the rules do not tolerate is fishing before action to try to discover some ground for bringing suit").[16]

The proposition that a plaintiff may proceed past the pleading stage to see if he can unearth a claim in discovery has been consistently rejected. *See, e.g., DM Research, Inc.*, 170 F.3d at 55; *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 739 (9th Cir. 1987).[17]

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[16] This is especially so in light of the recent amendments to the Federal Rules which narrow the scope of discovery. *Compare* current Rule 26(b)(1), Fed. R. Civ. P. (information discoverable if "relevant to the claim or defense") *with* prior rule (information discoverable if "relevant to the subject matter of the action").

[17] The *only* provision in the Federal Rules relating to pre-action discovery is Rule 27, which permits depositions before an action for the sole purpose of "perpetuat[ing] testimony". Rule 27 was not "designed as a means of ascertaining facts for drafting a complaint", and is inapplicable here. *Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 485 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000). In this respect, the Federal Rules are to be contrasted with state statutes that provide for limited

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Clearly, then, a plaintiff does not need, and is not entitled to, discovery to allege an inference of discrimination.

D. The Requirement That A Complaint Allege An Inference Of Discrimination Furthers The Goals Of The Anti-Discrimination Statutes.

The purpose of Title VII and the ADEA, as well as the other anti-discrimination statutes, is to assure equality of employment opportunities and eliminate discriminatory employment practices. *See McDonnell Douglas*, 411 U.S. at 800. To promote these policies, the courts must be available to those employees who raise legitimate charges of discrimination. Requiring a plaintiff to state a claim of discrimination and plead facts that support an inference of discrimination furthers these goals. A change in the law to permit the conclusory allegation that "I was fired because of my [protected class]" will have the contrary effect. The consequences, which will be significant and adverse, will extend to the courts, the accused employer and its employees, and those plaintiffs who *have* been the victims of discrimination.

Federal courts are flooded with employment discrimination complaints. Civil rights-related cases have increased from approximately 9% of all federal civil cases in 1990 to 16% in 2000. *See* U.S.

"disclosure to aid in bringing an action". *See, e.g.*, N.Y. C.P.L.R. 3102(c) (McKinney Supp. 2001-2002).

Department of Justice, Bureau of Justice Statistics, Special Report: *Civil Rights Complaints in U.S. District Courts, 1990-1998*, Fig. 1 (Jan. 2000, updated Dec. 12, 2001) (on file with Marika F.X. Litras, Ph.D., BJS Statistician). About 57% of the increase in civil rights-related cases over this period was due to complaints related to employment issues, which increased 2 ½ times from 8,413 in 1990 to 23,735 in 2000. *Id.*

Many of these claims are without merit. For example, during fiscal year 2000, the EEOC found "reasonable cause" to believe that there was a violation in only 8.2% of the charges alleging age discrimination under the ADEA and 8.6% of the charges alleging national origin discrimination under Title VII. *See EEOC Enforcement Statistics And Litigation*, http://www.eeoc.gov/stats. There is no doubt that "discrimination is odious but a frivolous or malicious charge of such conduct . . . is at least equally obnoxious". *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 728 (2d Cir. 1976).

The federal district courts, which deal with these cases on a daily basis and are thus most familiar with them, know that the anti-discrimination laws are frequently misused by disgruntled employees. As one District Judge recently stated,

> If a terminated employee wishes to file a discrimination lawsuit, he must have rational reasons that could reasonably support a conclusion that he was terminated *because* he was a member of the protected class, not just dissatisfaction at being fired, confusion

as to the reason, and a hope that discovery will pull something out of the water that could be "spun" as evidence of invidious discrimination. The anti-discrimination laws exist for the important but narrow purpose of preventing employment decisions from being made on the basis of mindless prejudice against irrelevant and immutable characteristics, such as race, gender, and age. They do not exist to provide an alternative means of unemployment compensation, to require employers to treat members of protected classes differently than other employees, or to effect transfers of wealth to the legal profession and disgruntled former employees.

Cicero v. Borg-Warner Automotive, Inc., 163 F. Supp. 2d 743, 751-52 (E.D. Mich. 2001) (emphasis in original). *See also Noyer v. Viacom, Inc.*, 22 F. Supp. 2d 301, 308 (S.D.N.Y. 1998) (It is "ill use of federal discrimination laws to treat them as sharpening stones on which to grind personal axes"); *King v. Georgetown Univ. Hosp.*, 9 F. Supp. 2d 4, 7 (D. D.C. 1998) ("This is another example where the nation's anti-discrimination laws are being misused. Here a U.S. district court is asked to involve itself in a minor internal employee assignment decision").

Permitting claims like petitioner's to proceed only because the phrase "I was fired because of my [protected characteristic]" appears in the complaint would further burden the courts and encourage strike suits. As this Court has recognized, "even a

complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment". *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Eliminating Rule 12(b)(6) as a means to dispose of complaints that do not allege facts supporting an inference of discrimination would improperly increase their settlement value.

An employer compelled to defend against such suits faces significant costs, both tangible and intangible. There is, of course, the economic cost in the form of litigation expenses, which are often substantial and can be financially debilitating. Discovery is expensive. Indeed, the costs of discovery typically comprise about half of the total costs of litigation. *See* Thomas E. Willging et al., *An Empirical Study Of Discovery And Disclosure Practice Under The 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 548 (1998).[18]

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[18] In enacting the 1991 amendments to Title VII, 42 U.S.C. § 2000e *et seq.*, Congress declined to include unlimited compensatory and punitive damages because of the potential for misuse of the law and its impact upon employers. *See* 136 Cong. Rec. 22011 (1990) (statement of Rep. Ray, supporter of S. 1745, the Civil Rights Act of 1991) ("Even if they win the case, many small businesses will spend so much money on attorney fees and other associated costs that they will be financially weakened or perhaps put out of business all together."). The same fear arises if Rule

(Continued...)

Furthermore, discrimination is a serious accusation that frequently carries with it drastic consequences for the employer and the individuals charged. *See Carrasco v. New York City Off-Track Betting Corp.*, 858 F. Supp. 28, 30 (S.D.N.Y. 1994) (recognizing that "leveling civil rights charges against anyone carries serious consequences distinct from those accompanying garden-variety tort or breach of contract claims"), *aff'd*, 50 F.3d 3 (2d Cir. 1995); *see also* Cynthia L. Estlund, *The Workplace In A Racially Diverse Society: Preliminary Thoughts On The Role Of Labor And Employment Law*, 1 U. Pa. J. Lab. & Emp. L. 49, 80-81 (1998) ("An accusation of discrimination . . . raises the temperature of an employment dispute and puts the moral reputation of the employer and its agents on the line"). Sustaining a pleading that provides no basis from which to infer discrimination increases the risk that the accused individuals may lose their jobs or may be treated as suspect by other employees, even if they are innocent. *Cf.* Christina D. Henagen, *Note: False Claims Of Sexual Harassment In Education: The Path To An Appropriate Remedy for the Wrongly Accused*, 76 Wash. U. L.Q. 1431, 1440 n.49, n.50 (1998) ("A falsely accused teacher can lose his job as a result of the accusation and investigation or, at the very least, suffer damage to his reputation").

Once impugned, the reputations of an employer and its employees are not readily restored,

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12(b)(6) is rendered meaningless.

even if the claim is later dismissed on summary judgment. A plaintiff should have some legitimate minimal basis for his accusation before subjecting an employer to the lengthy and expensive process of clearing its good name and that of its employees. *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989) ("[T]o avoid tarring defendants' reputations unfairly and to prevent potential abuses, we have consistently required plaintiffs to outline facts sufficient to convey specific instances of unlawful discrimination").

Finally, and perhaps most importantly, allowing employment discrimination claims to proceed to discovery on the basis of allegations that are entirely conclusory is unjust to those plaintiffs whose claims have merit. Overburdened federal dockets mean that years may pass before an aggrieved employee is able to present his claim in court. *See Cicero*, 163 F. Supp. 2d at 758 ("Not only are frivolous suits wasteful, expensive and meddlesome to the immediate participants, they prevent plausible discrimination claims from being timely heard, and dissuade those who have actually been wronged from filing suit because of the inordinate length of time it would take to obtain a remedy"). The problem will be exacerbated if the courts are prevented from dismissing a purely conclusory allegation of discrimination on a motion to dismiss.

Thus, important policy reasons support the principle that discrimination claims should be required to satisfy a minimal standard of alleging a factual basis from which discrimination may be

inferred in order to state a claim and entitle a plaintiff to proceed further.

III

PETITIONER'S COMPLAINT DID NOT STATE A CLAIM OF NATIONAL ORIGIN OR AGE DISCRIMINATION

Petitioner's claim was that, in April 1997, Sorema terminated his employment because of his national origin (Hungarian) and age (50) (J.A. 22a-30a). Although this was the only employment decision at issue, petitioner's complaint was devoted, almost exclusively, to events that allegedly occurred years earlier. These time-barred events did not relate to petitioner's termination of employment, and could not be considered in assessing the sufficiency of petitioner's complaint. As found by both courts below, there were no allegations that raised an inference of discrimination with respect to petitioner's termination of employment. Hence, petitioner's complaint did not state a claim for discriminatory discharge.

A. Petitioner's Allegations Were Insufficient To Raise An Inference Of Discrimination.

Petitioner's complaint failed to allege any grounds for his discriminatory discharge claims other than in conclusory terms. The only allegations relating to petitioner's termination of employment were that (i) petitioner sent Mr. Chavel a memorandum "outlining his grievances", none of which had anything to do with his national origin or age; giving notice that he intended to resign; and

requesting a severance package "to resolve his disputes" (J.A. 26a, ¶ 31);[19] (ii) Mr. Chavel "did not respond" to the memorandum (J.A. 27a, ¶ 32); (iii) approximately two weeks later, on April 29, 1997, petitioner met with Mr. Chavel and Sorema's general counsel and was requested to act upon his expressed intention to resign (J.A. 27a, ¶ 33); and (iv) petitioner "refused to resign" and as a result was "fired" by Mr. Chavel (J.A. 27a, ¶¶ 34, 35). There is no hint of discrimination in these allegations.

1. The Complaint Did Not Allege National Origin Discrimination.

There were no grounds to infer that petitioner was discharged because he was Hungarian or because he was not French.

With respect to national origin, petitioner alleged only that (i) he was a United States citizen originally from Hungary (J.A. 24a, ¶ 12); (ii) Mr. Papadopoulo was a "natural born French citizen of Greek heritage" (J.A. 20a-21a, ¶ II); (iii) Mr. Chavel was a "French national" (J.A. 24a, ¶ 14); and (iv) Sorema was a "French owned company" (J.A.

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[19] In the memorandum, petitioner complained that he had "become increasingly frustrated, burnt out and demoralized" and attributed this to the "lack of cooperation, unreasonable demands and constant interference by [Mr. Papadopoulo]" (J.A. 34a). Petitioner enumerated the specific problems he had in getting along with Mr. Papadopoulo and other employees (J.A. 34a-35a), and concluded by announcing his intention to "leave the company" (J.A. 36a). The memorandum did not complain about discrimination, and it did not mention petitioner's national origin or age.

21a, ¶ III.5). The most these allegations suggested was that petitioner was of one national origin and certain of Sorema's employees were of other national origins. Obviously, differing nationalities, standing alone, do not create an inference of discrimination.[20]

Petitioner also named five employees whom he alleged were terminated for cause and were given severance packages, while he was purportedly terminated "without cause" and denied severance (J.A. 27a, ¶ 38). Although he could have pled the national origin of these five employees upon information and belief, petitioner offered no information about them, or their national origin.[21]

Petitioner, therefore, could not present a single reason to infer that his employment was terminated because he was Hungarian or because he was not French.

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[20] There can be no claim with respect to citizenship. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-91 (1973).

[21] The five employees alleged to have received severance packages upon termination for cause were Jay Kubinak, Thilo Herda, Douglas Zale, Nigel Harley and Marcus Corbally. (J.A. 27a, ¶ 38). None of the names indicated that they were of French extraction, and petitioner did not so allege. The district court pressed petitioner to provide some information about these individuals from which an inference of discrimination could be drawn, but petitioner did not do so (J.A. 42a, 45a).

2. The Complaint Did Not Allege Age Discrimination.

There were no grounds to infer that petitioner was discharged because he was over 40 years of age.

With respect to age, petitioner alleged only that (i) at the time he left Sorema, he was 50 years old, (ii) Mr. Chavel was also 50, and (iii) Mr. Papadopoulo was 33 (J.A. 20a-21a, ¶¶ II, III). He also admitted that he was over 40 when he was hired by Mr. Chavel (J.A. 24a ¶¶ 13, 17).

These allegations presented no reason to infer age discrimination. In fact, they supported the contrary inference -- that petitioner's age was irrelevant to Sorema. Mr. Chavel, the alleged discriminatory actor, was the same age as petitioner. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1337 (8th Cir. 1996); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991).

In addition, petitioner was 42 years old when he was hired. When an employer knowingly hires an individual who is within the protected class, it is presumed that the employee's subsequent termination was not motivated by discrimination. *See Rothmeier*, 85 F.3d at 1337; *Brown*, 82 F.3d at 658; *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991).

Finally, petitioner did not allege, even upon information and belief, the ages of any of the five individuals he claimed were given severance packages (J.A. 27a, ¶ 38).

Thus, there was no reason to infer that petitioner was discharged because of his age either.

B. Petitioner's Time-Barred Allegations Should Not Be Considered.

Title VII and the ADEA require a plaintiff to file a charge of discrimination with the EEOC within 300 days after the "alleged unlawful employment practice" occurred. 42 U.S.C. § 2000e-5(e)(1); *Equal Employment Opportunity Comm'n v. Commercial Office Prods. Co.*, 486 U.S. 107, 122-25 (1988). Petitioner filed his EEOC charge on July 11, 1997 (J.A. 23a, ¶ 8). Therefore, only acts that took place within the prior 300 days, *i.e.*, after September 14, 1996, are timely for purposes of Title VII and the ADEA.

Petitioner's complaint focused on events that supposedly happened well before September 1996. The complaint alleged that (i) "in February 1995", certain of petitioner's underwriting responsibilities were "transferred" to Mr. Papadopoulo, a 32-year old French national of Greek heritage (J.A. 25a, ¶ 19); (ii) in "February 1996", Mr. Papadopoulo was appointed chief underwriting officer (J.A. 25a, ¶ 21); and (iii) "at the time", Mr. Chavel stated that he "wanted to 'energize' the underwriting department" (J.A.25a, ¶ 23). These allegations were untimely and could not be used to support petitioner's claims.[22]

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[22] The lower courts were generous to petitioner and considered these allegations. However, the time-barred (Continued...)

Again, this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), is on point. In *Ricks*, the plaintiff's discriminatory discharge claim relied on prior events involving his denial of tenure, which were outside of the limitations period, to show the alleged discrimination. The Court refused to consider the time-barred allegations, and dismissed the plaintiff's discharge claim because it did not allege an inference of discrimination.[23]

The Court confirmed that "'[t]he proper focus is upon the time of the *discriminatory acts*", and "[t]he emphasis . . . 'is [upon] whether any present violation exists'". *Ricks* at 258. Accordingly, a discrimination claim must stand or fall on its own terms and cannot be buttressed by time-barred events. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (holding that the allegedly discriminatory acts occurring outside the filing

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events did not give rise to an inference of discrimination with respect to petitioner's separation from the company in 1997.

[23] In order to avoid the statute of limitations, the plaintiff in *Ricks* sought to assert a continuing violation -- commencing with his denial of tenure and continuing through his termination of employment. The Court rejected this argument because "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination", and because the plaintiff did not identify the "alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment". *Ricks* at 257. Petitioner has never claimed a continuing violation, and such a claim would nevertheless fail for the same reasons that it was inadequate in *Ricks*.

period are "merely . . . unfortunate event[s] in history [with] no present legal consequences . . . [T]he critical question is whether any present violation exists"). *See also Watson v. Eastman Kodak Co.*, 235 F.3d 851 (3d Cir. 2000); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428 (11th Cir.), *cert. denied*, 525 U.S. 962 (1998).

Petitioner's claims suffered from this defect. His complaint was based on events relating to his "demotion", which were beyond the limitations period. The allegations concerning his termination of employment were purely conclusory, and set forth no facts suggesting discrimination. Accordingly, this is a situation where "the court can reliably determine from the pleadings that the claim has no merit". Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1759 (June 1998).

Thus, the only cognizable allegations concerning petitioner's termination of employment did not show any discrimination, and his discharge claim was insufficient to state a claim.

* * *

As each court that has reviewed petitioner's complaint has found, there was no basis to infer that petitioner's discharge was due to impermissible considerations. The *only* inference arising from the complaint is otherwise -- that petitioner himself caused the termination of his employment by sending an ill-considered memorandum to his superior giving notice of his resignation. Reviving petitioner's claims would be both unjust and unjustifiable. It would also compel the lower courts

to hold that discrimination claims, no matter how preposterous and unfounded on their face, automatically state a claim and that substantial time and resources must be invested before an employer can obtain their dismissal.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 21, 2001

Supreme Court, U.S.
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No. 00-1853

In the

Supreme Court of the United States

AKOS SWIERKIEWICZ,
Petitoner,

v.

SOREMA N.A.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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54 PP

QUESTION PRESENTED

Must an employment discrimination plaintiff do more in his complaint than put his employer on notice of his discrimination claims, *i.e.*, must he also plead specific facts showing that at trial he can make out a *prima facie* case of discrimination under *McDonnell Douglas v. Green*?

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JURISDICTION

The judgment below was entered on March 12, 2001 by the United States Court of Appeals for the Second Circuit. On September 25, 2001, this Court granted Mr. Swierkiewicz's petition for writ of certiorari. Jurisdiction here is conferred by 28 U.S.C. § 1254 (1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 8 (a) (2) of the Federal Rules of Civil Procedure provides in relevant part: "A pleading . . . shall contain . . . a short and plain statement of the claim showing the pleader is entitled to relief . . ."

Rule 9 (b) of the Federal Rules of Civil Procedure states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other conditions of mind of a person may be averred generally."

Rule 12 (b) (6) of the Federal Rules of Civil Procedure permits the filing of a motion to dismiss for "failure to state a claim upon which relief can be granted."

STATEMENT OF THE CASE

Fired from his job, Akos Swierkiewicz sued his former employer, Sorema N.A. ("Sorema"), on claims of national origin and age discrimination. His national origin claim was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* ("Title VII"); his age discrimination claim was based on the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et. seq.* ("ADEA").

A. COURSE OF PROCEEDINGS BELOW

Mr. Swierkiewicz's two count complaint was filed in the United States District Court for the Eastern District of Pennsylvania. On Sorema's motion, the action was transferred to the United States District Court for the Southern District of New York. Post-transfer, Sorema filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure seeking dismissal of the complaint on the ground that it failed to state a claim upon which relief could be granted. As pertinent here, it argued that the allegations of the complaint were "conclusory" and "fail[ed] to state a *prima facie* case of discrimination based on national origin or age." JA 17a; *see also* Memorandum in Support of Defendant's Motion to Dismiss at 8-13. With its motion, Sorema submitted an affidavit from its trial counsel that contained uncorroborated hearsay allegations that went well beyond the four corners of the complaint. JA 15a-17a. Mr. Swierkiewicz opposed the motion and objected to the improper allegations in defense counsel's affidavit.[1]

[1]The affidavit essentially rewrote the complaint so that it could be read in the light most favorable to Sorema. For example, while the complaint alleged that Mr. Swierkiewicz was demoted in 1995 on account of his national origin and age, JA 6a (¶ 19), the affidavit asserted there was no demotion, but rather, "a reorganization occurred at Sorema which resulted in *changes* in Swierkiewicz's job responsibilities." JA 16a (¶ 3), (emphasis added). Moreover, while the complaint alleged that after two years of discrimination following his demotion, Mr. Swierkiewicz sent a memo to Sorema's Chief Executive Officer ("CEO") outlining his grievances and requesting a severance agreement to resolve them, JA 8a (¶ 30), defense counsel's affidavit asserted, without reference to the two years of discrimination Mr. Swierkiewicz suffered, that he wrote the memo because "he was unhappy with his job and intended to leave the company . . ." JA 16a (¶ 4). Finally, while the complaint alleged that after receiving the memo Sorema's CEO gave Mr. Swierkiewicz two options – quit without a severance package or be fired – and that he was fired because he refused to quit, JA 9a (¶¶ 32-34), defense counsel's affidavit asserted he was fired because he "went to his office and cleared out all of his personal belongings [and then] refused to resign because Sorema did not grant him the severance he demanded." JA 16a (¶¶ 4-5). None of defense counsel's hearsay assertions can be squared with the allegations of the complaint nor can they be reasonably inferred from those allegations.

Shortly thereafter, while the motion to dismiss was still pending, Mr. Swierkiewicz amended his complaint as of course to add two supplemental claims for relief against Sorema. JA 22a-30a. These claims asserted that Sorema fired him on account of his national origin and age in violation of both New York State and City law. JA 29a (¶¶ 46-49). In response, Sorema renewed its motion to dismiss and repeated its assertion that the allegations of the amended complaint were conclusory and failed to make out a *prima facie* case of discrimination. In doing so, it submitted yet another affidavit from its trial counsel in support of the motion.[2]

After hearing oral argument, the district court granted Sorema's motion and dismissed the amended complaint with

[2]*See* JA 31a. In that affidavit, defense counsel attached a copy of a memorandum that Mr. Swierkiewicz wrote to Sorema's CEO in which he requested a severance package to resolve his grievances against the company. In the affidavit, defense counsel stated she was submitting the memorandum "[p]ursuant to the Court's request." JA 31a (¶ 1). Counsel for Mr. Swierkiewicz, however, was never made privy to that request, nor is it reflected on the district court docket entries; the first he became aware of the request was upon receipt of defense counsel's affidavit.

prejudice. JA 37a-43a.[3] Analyzing the case under the rubric of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it held that Mr. Swierkiewicz had adequately pled membership in a protected class, was qualified to perform his job and (it assumed *arguendo*) had suffered an adverse employment action. JA 38a. Nonetheless, despite five paragraphs in the amended complaint explicitly averring that Mr. Swierkiewicz was fired by Sorema on account of his national origin and age, JA 27a-29a (¶ ¶ 37, 43, 45, 47 and 49), the district court concluded he had "not adequately alleged a *prima facie* case . . . [to] support an inference of discrimination." JA 40a and 42a. Having dismissed Mr. Swierkiewicz's Title VII and ADEA claims on that basis, the district court then dismissed his pendent State and City law claims because "no additional facts" had been pled that would "cure the deficiencies in the federal claim[s]." JA 42a.[4]

Mr. Swierkiewicz appealed the dismissal of his action to the Second Circuit. Citing Rule 8(a)(2) of the Federal Rules of Civil Procedure, caselaw from this Court and five circuit courts of appeals, he contended that, at the pleadings stage, his amended complaint should have been analyzed

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[3]In its ruling, the district court stated that it did not rely on the uncorroborated hearsay allegations contained in the first affidavit of defense counsel. JA 38a. Sorema, nonetheless, insisted that the full affidavit be included in the Joint Appendix filed in the Second Circuit. It then proceeded to rely on the affidavit's hearsay allegations in its brief in support of affirmance.

[4]After dismissing the amended complaint, the district court refused Mr. Swierkiewicz's request for leave to amend paragraph 38 of his amended complaint to assert that due to his national origin and age he was denied severance benefits that Sorema routinely granted to other executives – five of whom he identified by name and each of whom, unlike Mr. Swierkiewicz, was fired for cause. JA 44a-45a; *see* ¶ 38 of the amended complaint at JA 27a; *and see* JA 44a (the request to amend ¶ 38). The district court stated that any such amendment would be "futile". JA 45a.

solely to determine if he had adequately put Sorema on notice of his discrimination claims – and not whether he could make out at trial a *prima facie* case of discrimination under *McDonnell Douglas v. Green*. Notwithstanding his argument, the Second Circuit affirmed the district court. It too analyzed the amended complaint under *McDonnell Douglas v. Green* and, having done so, it dismissed Mr. Swierkiewicz's allegations as "conclusory" and "insufficient as a matter of law to raise an inference of discrimination." JA 48a and 49a.

B. STATEMENT OF FACTS

As pled in the nine page amended complaint, Sorema is a French owned and controlled reinsurance company. JA 24a (¶ 14). In April 1989, Sorema hired Mr. Swierkiewicz, who is Hungarian, as a Senior Vice President and Chief Underwriting Officer ("CUO"). *Id.* (¶¶ 12 and 17). In all respects, he performed his job in a satisfactory and exemplary manner. JA 25a (¶ 18). However, in February 1995, Francois Chavel, a French national and Sorema's Chief Executive Officer, demoted Mr. Swierkiewicz and transferred the bulk of his CUO duties to another French national, Nicholas Papadopoulo. *Id.* (¶ 19). Mr. Papadopoulo was 32 years old at the time – 16 years younger and far less experienced than Mr. Swierkiewicz. *Id.* (¶¶ 19 and 22). When he made the decision, Mr. Chavel told Mr. Swierkiewicz he took the action to "energize" the underwriting department – clearly implying he felt Mr. Swierkiewicz was too old for the job. *Id.* (¶ 23).

A year later, Mr. Chavel formally appointed Mr. Papadopoulo to the CUO position. *Id.* (¶ 21). Mr. Swierkiewicz, by contrast, was relegated to a marketing and services position. *Id.* (¶ 19). In the meanwhile, much younger and less qualified employees were hired and promoted by Sorema to jobs which he was clearly qualified

to perform. JA 25a-26a (¶¶ 24-27). For example, Michel Gouze, another French national, was hired as Sorema's Vice President in charge of Marketing, but he had virtually no experience in the insurance or reinsurance business and thus had to rely on Mr. Swierkiewicz to perform his duties. JA 26a (¶¶ 26-28). Another employee, Daniel Peed, who was much younger than Mr. Swierkiewicz and who had previously reported to him, was promoted to the position of Senior Vice President of Risk Property. *Id.* (¶¶ 24-25). These decisions had nothing to do with Mr. Swierkiewicz's performance; quite the contrary, he was demoted on account of his national origin and age. JA 25a (¶ 20).[5]

Over the course of the next two years, Mr. Chavel continued to discriminate against Mr. Swierkiewicz on account of his national origin and age. JA 26a (¶¶ 29-31). He did so by isolating him, excluding him from business decisions and meetings, and denying him any opportunity for career growth at Sorema. *Id.* (¶ 29). Mr. Swierkiewicz tried to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subject, but his efforts were unavailing. *Id.* (¶ 30). Finally, on April 14, 1997, after two years of ongoing discrimination, Mr. Swierkiewicz sent Mr. Chavel a memo outlining his grievances and requesting a severance package from Sorema. *Id.* (¶ 31). Mr. Chavel did not respond to the memo. JA 27a. (¶ 32). Fifteen days later, on April 29, 1997, Mr. Chavel and Sorema's General Counsel met with Mr. Swierkiewicz and gave him an ultimatum:

[5]The Second Circuit erroneously characterized Mr. Swierkiewicz's demotion and reassignment as a "shift[ ]" and "transition" in his job responsibilities. JA 47a. These terms do not appear anywhere in the initial or amended complaints. To the contrary, both complaints characterize these job actions as a "demotion" based on Mr. Swierkiewicz's national origin and age. *See* JA 6a (¶ 19) and JA 25a (¶ 20). It is likely that the Second Circuit's mistaken characterization was drawn from the inadmissible hearsay allegations contained in defense counsel's first affidavit. JA 16a (¶ 3).

either resign without a severance package or be fired. *Id.* (¶ 33). Mr. Swierkiewicz refused to resign; whereupon, Mr. Chavel fired him effective that very day. *Id.* (¶¶ 34-35). There was no valid basis for the termination; it was, rather, motivated by Mr. Swierkiewicz's national origin and age (he was 50 at the time). *Id.* (¶¶ 36-37). Moreover, unlike other Sorema executives who were fired for cause and who nonetheless received generous severance packages from the company, Mr. Swierkiewicz, who was not fired for cause, was denied severance pay and benefits by Sorema. This too was motivated by his national origin and age. *Id.* (¶ 38); *see also* JA 44a-45a.

SUMMARY OF ARGUMENT

In affirming the dismissal of Mr. Swierkiewicz's amended complaint on the ground that its averments of discrimination were "conclusory," the Second Circuit in effect rewrote history. The battle between fact-pleading and simplified notice pleading was waged and resolved in 1938 when, in adopting the Federal Rules of Civil Procedure, this Court opted for the "short and plain statement" standard set out in Rule 8(a)(2) of the Federal Rules. Any misgivings or doubts about the propriety of the simplified notice pleading standard of Rule 8(a)(2) were effectively ended by the Court's unanimous opinion nineteen years later in *Conley v. Gibson*, 355 U.S. 41 (1957).

Years passed, however, and a new era encroached on *Conley* and Rule 8(a)(2) as a number of courts adopted a "heightened pleading" requirement for cases alleging violations of the civil rights laws. This too was rebuffed, again unanimously, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Still, the Second Circuit refused to yield, continuing as it had before to require fact-pleading in employment discrimination cases. But its rule is flatly inconsistent with *Conley*, *Leatherman* and Rule 8(a)(2) itself. Moreover, its attendant requirement that plaintiffs must plead the elements of a *McDonnell Douglas prima facie* case mistakes principles of pleading with principles of evidence. *McDonnell Douglas* is an evidentiary test – and just one of several – that a plaintiff must satisfy at trial. But requiring proof of discrimination at the pleadings stage, before the plaintiff has even had an opportunity for discovery, defeats the goal of Rule 8(a)(2) – simplified notice pleading followed by discovery, summary judgment or trial.

The Second Circuit's fact pleading requirement also exacts too high a price for many employment discrimination

plaintiffs. In today's environment, few defendants leave "smoking gun" evidence of their unlawful conduct. Yet at the same time these very defendants house the facts that plaintiffs need to prove their cases through circumstantial evidence. Consequently, requiring plaintiffs to aver in their complaints facts they cannot obtain without discovery dooms many worthy cases.

In this case, viewed properly through the simplified notice pleading standard of the Federal Rules, Mr. Swierkiewicz pled more than enough to defeat Sorema's motion to dismiss. Five times he alleged that Sorema fired him on account of his national origin and age. Moreover, he supported those conclusions with the following factual allegations: in 1995 he was demoted in favor of a much younger French national; in the succeeding two years, he was isolated, excluded from meetings and denied any opportunity for career growth. In the meanwhile, Sorema assigned much younger employees, including at least one other French national, to positions he was more qualified and experienced to perform. After efforts to resolve these conditions proved unsuccessful, Mr. Swierkiewicz sent a memorandum to Sorema's CEO seeking a severance package to resolve his grievances. Fifteen days later, he was fired on the spot without any severance package despite the fact that Sorema typically gave such packages to terminated employees (even ones, unlike him, terminated for cause). Taken together, these allegations of national origin and age discrimination were more than sufficient to take Mr. Swierkiewicz's Title VII and ADEA claims past the pleadings stage.

ARGUMENT

I. NOTICE PLEADING IS ALL THE FEDERAL RULES REQUIRE: TO DEMAND MORE AS THE SECOND CIRCUIT DID IS INCONSISTENT WITH THIS COURT'S PRECEDENTS, THE GOAL OF RULE 8(A)(2) AND CASELAW FROM OTHER CIRCUITS

The Second Circuit's decision – dismissing Mr. Swierkiewicz's amended complaint for being insufficiently fact-specific and failing to establish a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – represents a marked departure from this Court's notice pleading precedents. *See, e.g., Conley v. Gibson*, 355 U.S. 41 (1957) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). It also undermines the goal of Rule 8(a)(2) of the Federal Rules of Civil Procedure – the promotion of simplified pleading practice in federal district courts. *See, e.g.*, Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1942) (hereafter Clark, *Simplified Pleading*). Finally, the Second Circuit's decision conflates and confuses principles of pleading with principles of evidence in sharp contrast to the distinction drawn between the two by every other court of appeals that has considered the subject. *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000). For all these reasons, discussed more fully below, the Second Circuit's heightened pleading requirement has little to commend it and, therefore, should be rejected.

A. This Court's Precedents Have Unanimously and Consistently Upheld the Principle of Notice Pleading

The Second Circuit misconceived both its role and the applicable standard of review it was required to apply in

assessing the amended complaint. Its role was "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

To answer that question, reviewing courts must determine whether a plaintiff has stated "a claim upon which relief can be granted." Rule 12(b)(6), F.R.Civ.P. Ever since 1938, when the simplified notice pleading standard of the Federal Rules of Civil Procedure was first adopted, that has been construed to mean that a plaintiff has the duty – but no more than this is required – to put the defendant on notice of the nature of his action. *Conley v. Gibson*, 355 U.S. at 47. Fact pleading, a pre-1938 feature of code and common law practice, has long ago been abandoned in favor of "a short and plain statement of the claim showing that the pleader is entitled to relief", Rule 8(a)(2), F.R.Civ.P., and "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (footnote omitted).[6]

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[6]As Dean of the Yale Law School and the Reporter for the Advisory Committee that drafted the Federal Rules of Civil Procedure, and later as Judge and Chief Judge for the United States Court of Appeals for the Second Circuit, Charles E. Clark was the principal architect for the sea change wrought by the simplified notice pleading standard of the 1938 Rules. In an article he wrote in 1957, he remarked:

> The intent and effect of the rules is to permit the claim to be stated in general terms: the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.

Employment discrimination and other civil rights claims are not exceptions to the notice pleading standard of the Federal Rules. Indeed, *Conley* itself was a class action by African American railroad clerks who claimed their union had breached its duty of fair representation and discriminated against them in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq*. In reversing the Rule 12(b)(6) dismissal of their complaint, this Court unanimously rejected the union's argument that the complaint was insufficiently fact-specific, stating:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

355 U.S. at 47 (footnote omitted).

Seventeen years later, in *Scheuer*, another civil rights action, the Court unanimously cautioned lower federal courts against the too hasty dismissal of complaints based on their preliminary sense that recovery was "very remote." 416 U.S.

Honorable Charles E. Clark, *Special Pleading In The "Big Case"*, 21 F.R.D. 45, 47 (1957) (inside quotation and footnote omitted). *See also* Thomas O. Main, *Procedural Uniformity And The Exaggerated Role of Rules: A Survey of Intra-State Uniformity In Three States That Have Not Adopted The Federal Rules of Civil Procedure*, 46 Vill. L. Rev. 311, 327 (2001): "The drafters of the Federal Rules expressly rejected the code pleading requirement that complaints set forth facts sufficient to state a cause of action. Indeed, Rule 8(a)(2) was drafted deliberately to avoid usage of the terms 'fact' and 'cause of action,' and the confusion they caused."

at 236. Remoteness of recovery, the Court said, "is not the test." *Id.* Rather, "the complaint should be construed favorably to the pleader," *id.*, and allowed to proceed through discovery and then through summary judgment or trial. *Id.* at 250. Dismissal for failure to state a claim should only occur when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Id.* at 236, *quoting Conley*, 355 U.S. at 45-46.

Despite the holdings in *Conley* and *Scheuer*, a number of lower federal courts continued to hold civil rights plaintiffs to a higher pleading standard than otherwise required by Rule 8(a)(2). The trend in that direction was noted in a 1986 law review article. *See* Richard L. Marcus, *The Revival of Fact Pleading Under The Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986). In 1993, however, the Court unanimously held that any such heightened pleading requirement was improper. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, supra.* In an opinion by the Chief Justice, the Court stated: "We think that it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. The Chief Justice went on to say that in the absence of any amendment to the notice pleading standard of the Federal Rules, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-169.

Here, instead of deferring to the principle of notice pleading, the Second Circuit chastised Mr. Swierkiewicz for his "conclusory" allegations which, it held, were insufficient to "raise an inference of discrimination [against Sorema]." JA 49a. The District Court also rebuked Mr. Swierkiewicz for the same alleged defects. JA 40a (dismissing the amended complaint for alleging "in a conclusory fashion that he was terminated as a result of his age and national origin.").

These rulings were clearly improper. Five times in his amended complaint, Mr. Swierkiewicz pled that he was fired by Sorema on account of his national origin and his age. JA 27a-29a (¶¶ 37, 43, 45, 47 and 49) – and he supported those contentions with specific allegations of discrimination. Under the notice pleading standard of the Federal Rules, that was sufficient to take his case past the pleadings stage and on to either summary judgment or trial. *Accord Scheuer*, 416 U.S. at 250. *See also Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial").

B. The Goal of Rule 8(a)(2) Is Simplicity of Pleadings

The Second Circuit's departure from notice pleading principles is particularly ironic because the principal drafter of the Federal Rules of Civil Procedure was Charles E. Clark. *See* n.6 *supra*. In 1939, a year after the Rules were adopted, he became a judge on the Second Circuit where he served until his death in 1963. From 1954 to 1959 he was the Chief Judge of that Court. And from 1935 to 1956 he served as the Reporter for this Court's Committee on the Rules of Civil Procedure. *See* 4 *Who Was Who In America* 174 (1968).

Throughout his career, Judge Clark extolled the virtues of what he called the "simplified pleading" standard of the Federal Rules. *See, e.g.*, Clark, *Simplified Pleading*, *supra*, 2 F.R.D. at 456-458. "Strict special pleading," he remarked in another context, "has never been found workable." Honorable Charles E. Clark, *Special Pleading In The "Big Case"*, 21 F.R.D. 45, 47 (1957) (hereafter Clark, *Special Pleading In The "Big Case"*).[7]

[7]There are but two exceptions to the simplified pleading standard of Rule 8(a)(2) – cases alleging fraud or mistake. These are governed by Rule 9(b) of the Federal Rules of Civil Procedure which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Clearly, civil rights cases are exempt from the "particularity" requirement of Rule 9(b). *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

As a judge on the Second Circuit, Judge Clark authored several opinions rejecting the argument that the Federal Rules of Civil Procedure required the pleading of facts. In *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), for example, he wrote of a complaint that had been dismissed on the ground that it was insufficiently fact-specific:

> . . . here is another instance of judicial haste which in the long run makes waste. Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be a "short and plain statement of the claim showing that the pleader is entitled to relief."

Id. at 775. Thirteen years later, in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), writing as Chief Judge, he refused to engraft a fact-pleading requirement onto cases alleging a violation of the antitrust laws. "We see no reason whatever to believe that the Supreme Court intended its liberal rules governing pleadings to be inapplicable to a suit for treble damages." *Id.* at 323 (inside citation and quotation omitted).[8]

[8]*Nagler* was written in the wake of efforts by the Ninth Circuit in 1952 to revive the fact-pleading rules of the former code practice. *See Claim or Cause of Action*, 13 F.R.D. 253 (1952). The Advisory Committee to the Federal Rules, however, rejected the proposal in 1955. *See Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts*, at 18-19 (1955). This Court's decision two years later in *Conley v. Gibson*, 355 U.S. 41 (1957), effectively ended the effort

As further evidence that the Federal Rules only envision a simplified form of notice pleading, the drafters appended to the Rules a series of form complaints that were, in the words of Rule 84, "intended to indicate the simplicity and brevity of statement which the rules contemplate." The forms, ironically, "assume[d] the action to be brought in the Southern District of New York." *See Introductory Statement to Appendix of Forms*. Form 9, a Complaint for Negligence, shows just how simplified and general an acceptable complaint may be. In the second of a three paragraph complaint, the form avers:

> On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant *negligently* drove a motor vehicle against plaintiff who was then crossing said highway (emphasis added).

Certainly if a complaint that does no more than allege negligence can survive a Rule 12(b)(6) motion to dismiss, a complaint averring that an employee was fired because of his national origin and age (though far more than that is alleged here by Mr. Swierkiewicz) must also be sufficient to overcome a defense motion to dismiss.

Moreover, even if more were needed, a defendant can resort to Rule 12(e) which allows for the filing of a motion for a more definite statement where the complaint is unduly "vague or ambiguous." Normally, however, such a motion should not be necessary in cases of employment discrimination. That is because before a plaintiff can file a Title VII or ADEA suit, he must first file a charge of discrimination with the Equal Employment Opportunity Commission. *See* 42 U.S.C. §§ 2000e-5(b) (Title VII) and 29

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to amend Rule 8(a)(2) which, to this day, remains in the same form as it was when adopted in 1938.

U.S.C. §§ 626(d) (ADEA). The charge must contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (Title VII). *See also* 29 C.F.R. 1626.8(a)(3) (same as to the ADEA). This exhaustion of remedies requirement provides the defendant with advance notice of the claim and an opportunity to be heard in response to it. *Cable v. Ivy Tech State College*, 200 F.3d 467, 477 (7th Cir. 1999). Unlike most other federal court defendants, therefore, a Title VII and ADEA defendant does not come to court bereft of facts. Under these circumstances, the simplified notice pleading standard of Rule 8(a)(2) is more than sufficient to inform a discrimination defendant of the nature of the claims against it. To require more, as the Second Circuit has done, is inconsistent with both the language and goal of Rule 8(a)(2).[9]

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[9]Based on our research, the Second Circuit began requiring employment discrimination plaintiffs to plead facts, rather than general averments, in a series of cases dating back to 1971. *See, e.g., Avins v. Mangum*, 450 F.2d 932, 933 (2d. Cir. 1971) (complaint dismissed because plaintiff's failure to hire claim was "wholly conclusory"). *See also Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 703 (2d Cir.) (complaint dismissed because it "contains nothing more than naked assertions"), *cert. denied*, 409 U.S. 883 (1972) and *Martin v. New York State Department of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978) (complaint that "only" alleged racial discrimination in the denial of plaintiff's salary and benefits dismissed because it consisted "of nothing more than naked assertions") (emphasis added). The Second Circuit has continued to require fact pleading in employment discrimination cases despite this Court's rejection of a heightened pleading requirement in *Leatherman*. *See, e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565-566 (2d Cir. 2000) (employing a fact-bound *McDonnell Douglas* test in dismissing plaintiff's Title VII failure to promote complaint) and *Tarshis v. Riese Organization*, 211 F.3d 30, 35 (2d Cir. 2000) (reversing the dismissal of a Title VII and ADEA complaint but reiterating its view that "bold assertions and conclusions of law will not suffice").

C. Caselaw From Other Circuits Properly Distinguishes Between Pleadings and Evidence

The Second Circuit also erred by analyzing the amended complaint as if, at the pleading stage, Mr. Swierkiewicz had to make out a *prima facie* case of discrimination under *McDonnell Douglas v. Green*. But the issue of whether a plaintiff has adequately put a defendant on notice of his discrimination claim is entirely distinct and analytically different from the separate question of whether he has enough evidence to sustain a verdict at trial. *Cf., e.g., Conley* and *Scheuer* under which complaints were analyzed to determine if they satisfied the notice pleading standard of Rule 8(a)(2) *with* cases like *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) under which the plaintiffs' evidence was reviewed to determine if they could succeed on the merits at trial. *McDonnell Douglas* plays little or no part in the former analysis; it does, however, play a significant role in the latter analysis. *See Reeves*, 530 U.S. at 142: "*McDonnell Douglas* and subsequent decisions have established an allocation of the burden of production and an order for the presentation of *proof* in . . . discriminatory treatment cases" (emphasis added; inside quotation omitted).

Every other court of appeals that has explicitly considered the question has recognized the difference between the adequacy of a plaintiff's pleading and the adequacy of the evidence he must adduce at trial to sustain a discrimination verdict. The pleading may be adequate but, after discovery and the refinement of the litigation, the evidence may be lacking. For that reason, the five other courts of appeals that have ruled on this precise issue – the District of Columbia, the Third, Seventh, Eighth and Ninth Circuits – have all uniformly held that "a plaintiff need not set forth the elements of a prima facie case at the initial pleading stage . . ." *Sparrow v. United Air Lines, Inc.*, *supra*,

216 F.3d at 1113. *Id.* at 1114: "Sparrow did not have to make out a prima facie case of discrimination in his complaint" (inside quotation omitted). *See also Weston v. Pennsylvania*, 251 F.3d 420, 429 (3d Cir. 2001) (eschewing any requirement of fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint need not set out the elements of a *prima facie* case: "I was turned down for a job because of my race is all a complaint has to say") (internal quotations omitted); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) ("the *prima facie* case . . . analysis is an evidentiary standard – it defines the quantum of *proof* plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim") (emphasis in original); and *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) ("A plaintiff need not make a *prima facie* showing to survive a motion to dismiss provided he otherwise sets forth a short and plain statement of his claim showing he is entitled to relief"). *See also* 2A *Moore's Federal Practice*, ¶ 8.13 at 8-68 (2d ed. 1989) ("The pleading of evidence should be avoided").

What separates the Second Circuit from these five Circuits is a fundamental difference of opinion between notice and fact pleading. But that divide was crossed in 1938 when the Federal Rules of Civil Procedure were adopted. Since then, save for the Second Circuit which has required civil rights complaints to plead facts and not "naked assertions," *see Martin v. New York State Department of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978), the rule has been that general notice pleading is all that is required in a complaint. As the Sixth Circuit stated earlier this year, "[r]equiring plaintiffs to include specific allegations in their complaints will create havoc by moving our system past the

basic pleading requirements of the Federal Rules." *EEOC v. J. H. Routh Packing Co.*, 246 F.3d 850, 855 (6th Cir. 2001). *See also Bennett v. Schmidt*, *supra*, 153 F.3d at 519 ("Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of a party's *proof* leads to windy complaints and defeats the function of Rule 8") (emphasis in original). The Second Circuit's contrary view in effect conflates the standard of review under Rule 12(b)(6) with the standards governing Rule 56 summary judgment motions and Rule 50 motions for judgment as a matter of law. There being no valid basis to conflate Rule 12 (b)(6) with either Rule 50 or Rule 56, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990), the Second Circuit's contrarian position should be rejected.

II. THE SECOND CIRCUIT'S HEIGHTENED PLEADING REQUIREMENT ACTS AS A DETERRENT TO VALID EMPLOYMENT DISCRIMINATION COMPLAINTS

Employment discrimination cases are challenging for plaintiffs and courts because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). The lack of direct evidence makes it "easier [for an employer] to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996). *See also Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it"). The Second Circuit itself has acknowledged this reality:

> Because employers rarely leave a paper trail – or "smoking gun" – attesting to a discriminatory intent . . . disparate treatment plaintiffs must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. *Such determinations are, generally speaking, most competently and appropriately made by the trier of fact.*

Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (emphasis added).

In order to build a circumstantial case of intentional discrimination, plaintiffs need discovery. But just as in antitrust cases where "the proof is largely in the hands of the conspirators," *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), so too in an employment discrimination case most of the critical evidence – for example, personnel records, salary information and the identity of the employee's replacement – is in the hands of the employer. *See, e.g., Reeves, supra*, 530 U.S. at 147 ("the employer is in the best position to put forth the actual reason for its decision"). Without that discovery, a plaintiff has little chance of success – a point made clear by many circuit courts. *See, e.g., Sempier v. Johnson & Higgins*, 45 F.3d 724, 733-736 (3d Cir.) (reversing the grant of summary judgment in favor of the employer because discovery was improperly curtailed by the district court), *cert. denied*, 515 U.S. 1159 (1995); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-1363 (9th Cir. 1985) (holding summary judgment "patently inappropriate" because district court restricted plaintiff's ability to discover evidence necessary to establish a *prima facie* case of discrimination); and *Cedillo v. International Ass'n of Bridge & Structural Iron Workers*, 603 F.2d 7, 12 (7th Cir. 1979) (summary judgment reversed

because the district court improperly limited the plaintiff's right to discover information regarding the employer's motives).

In *McDonnell Douglas v. Green*, the Court catalogued some of the types of evidence that an individual plaintiff could use to prove, circumstantially, that he was the victim of unlawful employment discrimination. The Court's non-exclusive list included evidence showing how the employer treated non-protected employees who committed offenses comparable to the plaintiff's, the employer's prior treatment of the plaintiff, and the employer's "general policy and practice with respect to minority employment." 411 U.S. at 804-805 (footnote omitted).

In this case, Mr. Swierkiewicz never had an opportunity to take or receive any discovery from Sorema. Thus, due solely to the unwarranted dismissal of his lawsuit, Sorema never had to comply with the self-executing disclosure requirements of Rule 26 (a)(1) of the Federal Rules of Civil Procedure. Nor did Mr. Swierkiewicz ever have the chance to discover Sorema's reason for his employment termination; or why it was abrupt; or who made the decision; or the identity, age and national origin of his replacement; or how Sorema treated other terminated employees. Indeed, because he was fired on the spot without notice, he never had the opportunity to review or obtain his own personnel file or the files and records of other employees. All this discovery, through interrogatories, document requests and, most critically, depositions, would have been highly probative of his discrimination claims.

Caught in a Catch-22, Mr. Swierkiewicz was on the one hand required by the District Court and the Second Circuit to allege facts sufficient to make out a *prima facie* case of discrimination and, on the other hand, by virtue of the heightened pleading requirement those courts imposed on

him, he was precluded from taking discovery necessary to establish such a case. This not only prevented him from taking his case past the pleading stage, it also set too high a bar for other employment discrimination cases. As a recent law review article pointed out in commenting on this dilemma:

> When courts impose heightened pleading standards, they impose a burden of making specific factual allegations. Facts to support allegations of civil rights violations are, however, more often than not, in the hands of defendants. Accordingly, the imposition of a burden to plead specific factual allegations can be dispositive of many civil rights claims and have a chilling effect on still others.

Thomas O. Main, *Procedural Uniformity And The Exaggerated Role of Rules: A Survey of Intra-State Uniformity In Three States That Have Not Adopted The Federal Rules of Civil Procedure*, 46 Vill. L. Rev. 311, 327 (2001).

III. THE ALLEGATIONS OF THE AMENDED COMPLAINT SATISFIED THE NOTICE PLEADING STANDARD OF THE FEDERAL RULES

Whether viewed through the lens of the Second Circuit's heightened pleading requirement or, as it should have been, through the lens of Rule 8(a)(2)'s simplified notice standard, the allegations in Mr. Swierkiewicz's amended complaint were more than sufficient to defeat Sorema's motion to dismiss.[10]

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[10]Even were it necessary for a plaintiff at the pleadings stage to establish a *prima facie* case of discrimination (a counterintuitive assumption), the

Before recounting those allegations, two prefatory observations are necessary. First, in analyzing Sorema's motion to dismiss, the Second Circuit and the District Court were required to accept as true all the facts pled in the amended complaint and draw all reasonable references from those facts in favor of Mr. Swierkiewicz. *Conley v. Gibson*, *supra*, 355 U.S. at 45-46. Only if he could prove "no set of facts in support of his claim" should the amended complaint have been dismissed. *Id.* Second, and of particular importance here, the hearsay allegations in defense counsel's first affidavit, JA 16a (¶¶ 3-5), should not and cannot be considered in assessing the viability of the amended complaint. *See, e.g., Scheuer v. Rhodes*, *supra*, 416 U.S. at 249-250 and *Carter v. Stanton*, 405 U.S. 669, 671 (1972). *See also Great Atlantic & Pacific Tea Co. v. The Town of East Hampton*, 997 F. Supp. 340, 346 n.1 (E.D.N.Y. 1998) (refusing to consider an attorney's hearsay affidavit in ruling on a motion to dismiss). That affidavit attempted to skew the complaint in Sorema's favor, *see n.1*, *supra*, by suggesting that Mr. Swierkiewicz was not demoted in 1995; did not suffer two years of continuing discrimination thereafter; and was not fired in 1997 for discriminatory reasons but, rather, because he could not secure the severance package he demanded. All this may be fodder at trial. But none of defense counsel's contentions can be found in either the initial or amended complaint nor can they reasonably be inferred from them. Given the deferential standard of review owed Mr. Swierkiewicz's pleadings, *Conley*, *supra*, defense counsel's allegations (which themselves constitute rank hearsay) can play no part in the consideration of Sorema's motion to dismiss.

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burden to do so is "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). *See also Hollander v. American Cyanamid Co.*, 172 F.3d 192, 199 (2d Cir.) ("The burden of proof that must be met to establish a *prima facie* case is minimal"), *cert. denied*, 528 U.S. 965 (1999).

Returning, then, to the amended complaint, Mr. Swierkiewicz did more than just plead that he was fired due to his national origin and his age. While that was enough to put Sorema on notice of his claims under Rule 8(a)(2), he also pled that he was demoted by Mr. Chavel in 1995 in favor of Nicholas Papadopoulo, a substantially younger and less qualified French national; that this had nothing to do with his own performance, which had been stellar, but rather, was due to his national origin and his age; that after his demotion he suffered two years of continuous discrimination – which took the form of being isolated and excluded from meetings and being bypassed for assignments in favor of far less qualified non-protected class employees; that he protested these unsatisfactory working conditions in a memorandum he sent to Mr. Chavel; that fifteen days later, without notice or cause, he was fired by Mr. Chavel; and that he was then denied any severance benefits despite the fact that Sorema routinely provided these benefits to other executives (five of whom he identified by name) who, unlike him, were terminated for cause.

The Court of Appeals and the District Court disregarded nearly all this evidence. In doing so, they failed to read the amended complaint in the light most favorable to Mr. Swierkiewicz. This constituted reversible error (as it did in *Reeves*, 530 U.S. at 152, where the Court reversed on similar grounds a Rule 50 judgment that had been mistakenly entered in favor of the employer). Properly considered under the simplified notice pleading standard of the Federal Rules, the allegations in Mr. Swierkiewicz's amended complaint were more than sufficient to state claims for national origin and age discrimination in connection with his employment termination by Sorema. For that reason, Sorema's motion to dismiss should not have been granted.

CONCLUSION

Nearly half a century ago, Charles Clark, then the Chief Judge for the Second Circuit, wrote: "I fear that every age must learn its lesson that special pleading cannot do the service of trial and that live issues between active litigants are not to be disposed of or evaded on paper pleadings . . ." Clark, *Special Pleading In The "Big Case"*, *supra*, 21 F.R.D. at 46. That lesson, reiterated just eight years ago in this Court's unanimous decision in *Leatherman*, needs restating yet again. On that basis and for all the other reasons stated here, the decision of the Second Circuit should be reversed.

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No. 00-1853

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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE COMPLAINT SATISFIES THE SIMPLIFIED NOTICE PLEADING STANDARD SET UP BY THE FEDERAL RULES

As it did in the courts below, Sorema N.A. ("Sorema") relies on "facts" nowhere to be found in the four corners of Mr. Swierkiewicz's pleading to support dismissal of his complaint.[1] But its reliance on those "facts," like its previous reliance on its counsel's hearsay affidavit (JA 15a *et seq.* at ¶¶ 3-5), breaches the fundamental principle that the parties and the Court are confined on a motion to dismiss to just those averments set forth in the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 249-250 (1974). Moreover, by mischaracterizing to its own advantage a number of the allegations that are specifically set out in the complaint, Sorema in effect displaces the rule that requires a pleading to be read in the light most favorable to the pleader for one that requires it to be read in the light most favorable to the party seeking dismissal. This too is improper. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Having thus mischaracterized the complaint, Sorema then asks the Court to hold employment discrimination plaintiffs to a degree of factual specificity not otherwise required, much less contemplated, by Rule 8(a)(2) of the Federal Rules of Civil Procedure. We have previously taken up this point. *See* Pet. Br. at 10-20. But the illogic of Sorema's position is further revealed by the conclusory averments contained in the four complaints this Court sustained in *Conley, Scheuer, McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Applying the simplified notice pleading principles of those cases, as well as the precedents from every other circuit court save for the Second, *see* Pet. Br. at 18-20, leads ineluctably to the conclusion that Sorema's motion to dismiss Mr. Swierkiewicz's complaint should have been denied.

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1. We use the term "complaint" to refer to both the initial and amended complaints since they each raise the same factual allegations to support Mr. Swierkiewicz's claims of national origin and age discrimination.

A. Sorema Has Mischaracterized the Allegations of the Complaint

Not once in its recitation of the facts did Sorema mention that Mr. Swierkiewicz was "demoted" in 1995 and replaced by a substantially younger French national, Nicholas Papadopoulo, who possessed none of his qualifications or experience. Nor did Sorema mention that the demotion was the act of another French national, Francois Chavel, its CEO, and the same person who fired Mr. Swierkiewicz two years later. In addition, Sorema wholly omits reference to the fact that, following Mr. Swierkiewicz's demotion, Mr. Chavel promoted and hired other employees (*e.g.*, Daniel Peed, who was much younger than Mr. Swierkiewicz, and Michel Gouze, another French national) for jobs he was more qualified to perform. Indeed, and most critically, Sorema wholly omits mention of the complaint's averment that for two years following his demotion, Mr. Chavel discriminated against Mr. Swierkiewicz on account of his national origin and age by "isolat[ing] [him], exclud[ing] [him] from business decisions and meetings and deny[ing] [him] the opportunity to reach his true potential at Sorema." JA 26a at ¶ 29.

All these averments were clearly pled in the complaint. JA 25a-26a at ¶¶ 19-29. So too were the allegations that Mr. Swierkiewicz tried unsuccessfully to resolve his grievances with Mr. Chavel, JA 26a at ¶ 30, and, finally, sent him a memo seeking a severance package to resolve his disputes with Sorema. JA 26a at ¶ 31. But this too did no good and only led to his abrupt and severance-less firing by Mr. Chavel — an act of national origin and age discrimination that stood in sharp contrast to the favorable treatment that Sorema accorded other executives (five of whom were named in the complaint) for whom it *did* have cause to terminate their employment. JA 27a at ¶ 38.

Ignoring these allegations of national origin and age discrimination will not, however, make them go away. Nor does it suffice for Sorema to mischaracterize the facts actually pled by Mr. Swierkiewicz. For example, it does not advance Sorema's cause (or the Court's standard of review) for it to say that Mr. Chavel merely "transferred" Mr. Swierkiewicz's Chief Underwriting Officer duties and assigned them to Mr. Papadopoulo (Resp. Br. at 1 and 44), when in fact the complaint says this represented a

discriminatory "demotion" based on Mr. Swierkiewicz's national origin and age (JA 25a at ¶¶ 19-20). Nor is there anything in the record to support Sorema's contention that at the time of his demotion Mr. Swierkiewicz "was given additional marketing and services responsibilities" to perform (Resp. Br. at 1). Similarly, Sorema has no basis to state that, at the time of his separation, Mr. Swierkiewicz "cleared out" all the personal belongings from his office (Resp. Br. at 2); committed "hostile" actions against it (*id.*); and, most egregious of all, that his "complaint admitted that he had precipitated his own separation from the company by sending an intemperate memorandum to the president of the company and tendering his resignation" (*id.* at 29-30).

Not one of these allegations can be found in or reasonably inferred from the complaint. The best that can be said for them is that they significantly mischaracterize what Mr. Swierkiewicz set forth in his EEOC charge (JA 20a-21a). There, rather than admitting he was responsible for his job loss, Mr. Swierkiewicz stated that Mr. Chavel accused him of committing "a hostile act against the company by clearing out my personal items from my office." JA 20a. But attributing that remark to Mr. Chavel is a far cry from an admission of wrongdoing by Mr. Swierkiewicz; quite the contrary, the charge states that Mr. Chavel fired Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (51). JA 21a. The complaint says the same thing. JA 27a-29a at ¶¶ 37, 43, 45, 47 and 49. Construing it in the light most favorable to Mr. Swierkiewicz, as the Court must, *Scheuer*, 416 U.S. at 236, there can be no doubt its averments, taken as whole, more than adequately state claims for relief under both Title VII and the ADEA.[2]

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2. The *amicus curiae* Brief of the Equal Employment Advisory Council ("EEAC") advances the speculative argument that "Sorema could have had a number of lawful reasons for firing Swierkiewicz." Br. at 15. Alternatively, it goes on to say, Sorema "could have fired Swierkiewicz for no reason without violating Title VII or the ADEA." *Id.* Absent a responsive pleading from Sorema, however, there is no record support for these statements. Indeed, they are contrary to what the complaint says, *viz*, "Sorema had no valid basis to fire Mr. Swierkiewicz," JA27a at ¶ 36; rather, his "age and national origin were motivating factors in Sorema's decision to terminate his employment." *Id.* at ¶ 37. In light of those averments, the speculation of the EEAC only "underscores the danger of

B. Sorema Has Misconceived the Function and Goal of Rule 8(a)(2)

Having mischaracterized the facts that were pled by Mr. Swierkiewicz, Sorema then proceeds to argue that the complaint's allegations of national origin and age discrimination are wholly conclusory and thus legally insufficient to pass muster under Rule 8(a)(2). Some "facts" must be pled, it argues, to avoid dismissal of a federal court complaint. Of course, Sorema is wrong in asserting that Mr. Swierkiewicz did not plead sufficient facts to overcome its motion to dismiss — even under the flawed fact-pleading requirement of the Second Circuit. But more fundamentally, Sorema is mistaken because the Federal Rules eschew fact pleading and, since 1938, have opted instead for what the Court has characterized as "simplified notice pleading." *Conley*, 355 U.S. at 47 (inside quotation omitted). While Sorema is critical of the Court's use of that term, *see* Resp. Br. at 13 n.4, it is one the Court has unanimously and consistently used or applied in each of its subsequent civil rights pleading cases. *See, e.g., Scheuer*, 416 U.S. at 236 and 250 (citing *Conley* and applying notice pleading principles to reject defense efforts to dismiss the plaintiffs' complaint for lack of specificity); *McDonald*, 427 U.S. at 283 n.11 (1976) (citing *Conley* and rejecting defense efforts at dismissal based on the complaint's lack of "particularity" and emphasizing that any such assertion "too narrowly constricts the role of the pleadings"); and *Leatherman*, 507 U.S. at 168 (citing *Conley* and holding that "it is impossible to square [a] heightened pleading standard . . . with the liberal system of notice pleading set up by the Federal Rules") (inside quotations omitted).

Indeed, if Rule 8(a)(2) were held to require some measure of fact-pleading, as Sorema contends, the outcomes in those four cases would doubtless have been different. For example, in *Conley* the plaintiffs' complaint only averred "that the Union had failed *in general* to represent Negro employees equally and in good faith." 355 U.S. at 43 (emphasis added). In *Scheuer*, the complaints only "alleged *generally and in conclusory terms* that the defendants

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dismissing a discrimination case on a minimal record." *Gilligan v. JAMCO Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997).

conspired to call out the National Guard and were guilty of wanton, wilful and negligent conduct when they knew or should have known that there was no cause or insufficient cause therefor", *Krause v. Rhodes*, 471 F.2d 430, 433 (6th Cir. 1972) (emphasis added), *rev'd*, 416 U.S. 232 (1974). In *McDonald*, the plaintiffs made no effort to plead anything more than they were fired while similarly situated employees were not, 427 U.S. at 283 and n.11. And in *Leatherman*, a Section 1983 failure to train case, the plaintiffs' complaint "fail[ed] to state *any facts* with respect to the adequacy (or inadequacy) of the police training." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1058 (5th Cir. 1992) (emphasis added), *rev'd*, 507 U.S. 163 (1993).

Yet, despite their general and conclusory allegations, the complaints in all four cases were sustained by the Court. That is because Rule 8(a)(2) does not require the pleading of "facts" or "causes of action," *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944), but rather, it only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The rest is left for discovery, summary judgment or trial. *Accord Leatherman*, 507 U.S. at 168-169 ("federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later"). *See also* Honorable Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 467 (1942) ("[U]nder the present scheme the pleadings are not the place to obtain particularization of the case . . . the parties are protected by discovery, pre-trial and summary judgment").

As applied here, the question thus becomes: Has Mr. Swierkiewicz provided Sorema with fair notice of his Title VII and ADEA claims and the grounds on which they rest? The answer, we submit, is yes. He is a person covered by both statutes. *See* 42 U.S.C. § 2000e(a) and (e) (Title VII) and 29 U.S.C. §§ 630(a) and 631(a) (ADEA). Sorema is an employer covered by both statutes. *See* 42 U.S.C. § 2000e(b) (Title VII) and 29 U.S.C. § 630(b) (ADEA). Mr. Swierkiewicz has the right not to be discriminated against on account of his national origin and age; correspondingly, Sorema may not discriminate against him on either ground. *See* 42 U.S.C. § 2000e-2a (Title VII) and 29 U.S.C. § 623(a) (ADEA). The at-issue employment decision, Mr. Swierkiewicz's dismissal, is

clearly an adverse action.[3] Mr. Swierkiewicz contends it was motivated by his national origin and his age (the culmination of two years of ongoing discrimination). JA 27a at ¶ 37 and JA 28a-29a at ¶¶ 43, 45, 47 and 49. He identified the person who fired him, Mr. Chavel, JA 27a at ¶ 35, the date he was fired, April 29, 1997, *id.*, and he anticipated any defense to his firing by asserting that "Sorema had no valid basis to fire [him]." *Id.* at ¶ 36. Having eliminated any lawful reason for Sorema's actions, his complaint sufficiently put Sorema on notice that he believed and intended to prove at trial that he was unlawfully fired in violation of Title VII and the ADEA. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("when all legitimate reasons for [the adverse employment action] have been eliminated . . . it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration . . .") (emphasis in original). That was more than enough to satisfy the notice pleading standard of Rule 8(a)(2) — a conclusion further supported by the official forms appended to the Federal Rules.

3. Sorema nonetheless argues that Mr. Swierkiewicz resigned his job, Resp. Br. at 28-29 and 41. There is, however, no basis in the complaint for that argument. It avers that Mr. Chavel gave Mr. Swierkiewicz the option to resign (without a severance agreement) or be fired. JA 27a at ¶ 33. He refused to resign and, as a result, he was immediately fired by Mr. Chavel. *Id.* at ¶¶ 34-35. Clearly that constituted an adverse employment action under both Title VII and the ADEA. Nor does the decision by the State of New York to deny unemployment compensation benefits to Mr. Swierkiewicz have any preclusive effect on his Title VII and ADEA claims. That decision is referenced by Sorema to support its argument that Mr. Swierkiewicz voluntarily caused his own unemployment. Resp. Br. at 29 n.12. However, in making this argument, Sorema overlooks the provision in New York's unemployment compensation law that specifically provides that "[n]o finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a *court* shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding . . ." N.Y.Lab.Law § 623.2 (McKinney 1988) (emphasis added) (with exceptions not relevant here). Since the decision in Mr. Swierkiewicz's unemployment compensation case is not preclusive as a matter of state law, it cannot act as an estoppel to his federal court Title VII and ADEA action. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 (1982) (federal courts are required "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged") (footnote omitted).

See, e.g., Form 5, which approves a complaint that simply states: "Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936."[4]

C. Sorema Has No Basis to Discount the Prior Acts of Discrimination It Committed Against Mr. Swierkiewicz

In a final effort to support dismissal of the complaint, Sorema maintains that the acts of discrimination it committed against Mr. Swierkiewicz prior to his firing are time-barred and, therefore, legally irrelevant. Sorema is mistaken. Prior acts of discrimination against a plaintiff can be "quite probative" of the at-issue discrimination claim even if those prior acts are time-barred. *Bazemore v. Friday*, 478 U.S. 385, 402 n.13 (1986). That is because these acts "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Indeed, although ignored by Sorema, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court specifically held that an employer's "treatment of [the plaintiff] during his prior term of

4. Despite the conclusory allegations sanctioned by the official forms, *amicus curiae* the Center for Individual Freedom speculates that allowing conclusory allegations of discrimination will render Rule 12(b)(6) "a nullity" in the employment context. Br. at 2 and 5. That is a mistaken view. As in other contexts, it is conceivable that an employment discrimination complaint may be so deficient as to fail to state a claim upon which relief can be granted. For example, an action under the Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.* may be dismissed where the plaintiff alleges she is not disabled and thus not entitled to relief, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Similarily, a Title VII national origin action may be dismissed where the plaintiff pleads the statue of limitations has run on his case, *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Likewise, an ADEA action may be dismissed where the plaintiff pleads he is not yet forty years old. *See* 29 U.S.C. § 631(a) ("the prohibitions in [the ADEA] shall be limited to individuals who are at least 40 years of age"). There doubtless are other examples where, in effect, a plaintiff can plead him or herself out of court. But these are rare cases. *See, e.g.*, 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure*, § 1357 at 344 (2d ed. 1990) ("As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief") (footnote omitted). And this, we submit, is not one of them.

employment" was relevant to determine whether his subsequent failure to rehire claim had merit. *Id.* at 558.[5]

The Court's statement in *McDonnell Douglas* is particularly apt here since the decision-maker, Mr. Chavel, not only was responsible for firing Mr. Swierkiewicz, he was also responsible for discriminatorily demoting him two years earlier (JA 25a at ¶¶ 19-20); telling him the demotion was needed to "energize" the underwriting department — a comment "clearly implying that plaintiff was too old for the job" (JA 25a at ¶ 23); hiring and promoting non-protected class members to jobs for which Mr. Swierkiewicz was qualified (JA 25a-26a at ¶¶ 24-27); and subjecting him to two years of continuous discrimination following his demotion. JA 26a at ¶¶ 29-31. Since he was the "same actor" in regard to all these actions, Mr. Chavel's conduct in the two year period preceding Mr. Swierkiewicz's discharge is "quite probative" of the discharge claims at issue in this suit. *Bazemore*, 478 U.S. at 402 n.13; *accord Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of

5. Nearly every court that has subsequently considered the issue, including the Second Circuit, has similarly held that evidence of prior discrimination against the plaintiff "cannot be ignored." *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (time-barred evidence of discrimination against other minorities that occurred before the plaintiff was even hired held admissible). *See also Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1210 (2d Cir. 1993) (evidence spanning 20 years held admissible in plaintiff's sex and age discrimination suit); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 433 (3d Cir. 1997) (time-barred events held relevant to plaintiff's claim of tenure discrimination); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1093-1095 (5th Cir. 1994) (ageist comments spanning a four year period held admissible in an ADEA discharge case), *cert. denied*, 513 U.S. 1190 (1995); and *Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir. 1986) (evidence of time-barred acts of discrimination against plaintiff that occurred prior to her at-issue demotion held relevant).

some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario").[6]

6. Three final comments are warranted to respond to several other points raised by Sorema. First, contrary to Sorema's representation, Resp. Br. at 19, Mr. Swierkiewicz did not elect to proceed with a circumstantial case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That decision need not be made until the close of trial since, until at least discovery has been completed, a knowing decision cannot be made whether to proceed under a "mixed motives" or circumstantial case of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989); *id.* at 278 (O'Connor, J., concurring). Second, neither Mr. Chavel's age (allegedly the same as Mr. Swierkiewicz's) nor his alleged hiring of Mr. Swierkiewicz in 1989 (another "fact" no where to be found in the record) acts as a bar to suit as Sorema suggests. Resp. Br. at 43. Quite the contrary: the issue here is whether Sorema terminated Mr. Swierkiewicz in 1997 on account of his national origin and age — an issue that specifically addresses Mr. Chavel's conduct and actions from 1995 when he demoted Mr. Swierkiewicz to and through the following two years of discrimination leading to his termination. Ultimately, that issue and the weight, if any, to be given to Mr. Chavel's age and his alleged hiring of Mr. Swierkiewicz should be decided at trial by a jury. *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998), and not on the basis of Sorema's factually unsupported motion to dismiss. Third, the determination by the EEOC, referenced by Sorema, Resp. Br. at 32, but nowhere to be found in the record, is legally irrelevant. Title VII and ADEA actions are *de novo* proceedings that may be pursued regardless of whether or not the EEOC has found cause to believe that discrimination occurred. *McDonnell Douglas*, 411 U.S. at 798-799 (Title VII), *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 112-113 (1991) (ADEA).

CONCLUSION

For all the reasons stated, the judgment of the Second Circuit should be reversed.

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No. 00-1853

In the Supreme Court of the United States

AKOS SWIERKIEWICZ, PETITIONER

v.

SOREMA N.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a complaint in an employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, must plead specific facts establishing a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the application of Federal Rule of Civil Procedure 8, which outlines the required content of a complaint, to employment discrimination claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII against public and private employers. In addition, the EEOC has primary responsibility for administering and enforcing the Age Discrimination in Employment Act. The Court's decision in this case thus is likely to affect

the enforcement responsibilities of the EEOC and the Attorney General. Furthermore, Title VII and the Age Discrimination in Employment Act apply to the federal government in its capacity as the nation's largest employer. 42 U.S.C. 2000e-16 (1994 & Supp. V 1999); 29 U.S.C. 633a; 2 U.S.C. 1311(a)(2).

STATEMENT

1. This case concerns the adequacy of a complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* In relevant part, Title VII makes it unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). The ADEA, in nearly identical terms, makes it unlawful for an employer to discharge or otherwise discriminate against an individual "because of such individual's age." 29 U.S.C. 623(a)(1).

Federal Rule of Civil Procedure 8 governs the content of pleadings in all suits of a civil nature in the United States district courts. See Fed. R. Civ. P. 1, 8. Rule 8(a) directs that a complaint initiating a civil action "shall contain" a statement of jurisdiction, a demand for relief, and "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule further provides that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e)(1). Lastly, Rule 8(f) instructs that "[a]ll

pleadings shall be construed as to do substantial justice."

2. Petitioner is a United States citizen of Hungarian ancestry. J.A. 24a; Pet App. 2a. Respondent is a New York reinsurance company owned and controlled by a French parent company. *Ibid.* Petitioner began working for respondent in April 1989 as a Senior Vice President and Chief Underwriting Officer. *Ibid.* In April 1997, respondent fired petitioner. J.A. 27a; Pet. App. 3a.

Petitioner filed suit under Title VII and the ADEA claiming that respondent unlawfully terminated him "on account of his age and national origin." J.A. 28a. According to his ten-page complaint, petitioner had performed his job "in a satisfactory and exemplary manner." J.A. 25a. Nevertheless, in February 1995, respondent demoted petitioner and transferred his responsibilities to another employee who was both a French national and 16 years younger, even though that employee "was far less experienced and less qualified" than petitioner. *Ibid.* Respondent's chief executive officer demoted petitioner because "he wanted to 'energize' the underwriting department," a statement that petitioner understood as "clearly implying that plaintiff was too old for the job." *Ibid.*; Pet. App. 2a. The complaint alleges that this demotion was "on account of [petitioner's] national origin (Hungarian) and his age (he was 49 at the time)." J.A. 25a. The complaint further alleges that a number of other inexperienced individuals were hired to assume petitioner's duties, all of whom were either French nationals or significantly younger than petitioner. J.A. 26a. In addition, respondent "isolated" petitioner and "excluded [him] from business decisions and meetings" following the demotion. *Ibid.*

In April 1997, "following two years of ongoing discrimination on account of his national origin and age," J A. 26a, petitioner sent respondent's chief executive officer a memorandum requesting a severance package comparable to that offered to other executives who were terminated. *Ibid.* Respondent instead offered petitioner the choice of resigning without any benefits or being fired. J.A. 27a. When petitioner refused to resign, respondent fired him. *Ibid.* According to the complaint, respondent "had no valid basis to fire [petitioner]" and his "age and national origin were motivating factors in [respondent's] decision to terminate his employment." *Ibid.*; see also J.A. 28a-29a.

The district court granted respondent's motion to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), on the ground that "[petitioner] has not adequately alleged a prima facie case, in that he has not adequately alleged circumstances that support an inference of discrimination." Pet. App. 9a.

3. The court of appeals affirmed. Pet. App. 1a-4a. The court held that, "[t]o plead" national origin or age discrimination, a plaintiff's complaint must allege (i) membership in a protected class, (ii) qualification for the job at issue, (iii) an adverse employment action, and (iv) "circumstances that give support to an inference of discrimination." *Id.* at 3a (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)). The court concluded that all of petitioner's allegations "are insufficient as a matter of law to raise an inference of discrimination." Pet. App. 3a.

SUMMARY OF ARGUMENT

Petitioner's complaint properly states a claim for relief under Federal Rule of Civil Procedure 8(a)(2).

That Rule requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This Court has held that the Rule is satisfied if the complaint provides the defendant fair notice of the character of the claim and the grounds upon which it rests. Petitioner's complaint gave such notice. It repeatedly asserted that respondent had discriminated against petitioner in his employment on the basis of national origin and age, and it identified the specific adverse employment actions giving rise to the claim. Rule 8(a)(2) requires no more.

The court of appeals' requirement that employment discrimination complaints include facts demonstrating a prima facie case is fundamentally flawed. First, the rule erroneously conflates the fair notice owed a defendant at the outset of the litigation with the standards governing the plaintiff's presentation of proof in court. The court's holding also cannot be reconciled with this Court's decisions generally rejecting the imposition of heightened pleading standards under Rule 8. More fundamentally, the requirement that a complaint allege evidence of a prima facie case disregards the entire purpose and history of Rule 8. The Federal Rules of Civil Procedure were intended to simplify and expedite the pleading stage of litigation, so that parties could more expeditiously proceed to resolving litigation on the merits. To that end, in 1952, the Advisory Committee on the Civil Rules specifically considered and rejected an amendment of Rule 8 that would require plaintiffs to allege, as the Second Circuit did here, all of the facts constituting the cause of action. The Second Circuit's regime thus resurrects the very prolix, technical, and fact-intensive pleading procedures that the modern rules deliberately eschewed.

This case, involving statutory claims against a private employer, obviously does not raise any qualified immunity issue. On a number of occasions, this Court has reserved the question whether particularized pleading rules or procedures are necessary to effectuate the qualified immunity doctrine's protection against discovery and trial. Nothing in the Court's resolution of this case should implicate the distinct pleading issues involved in qualified immunity litigation.

ARGUMENT

PETITIONER'S COMPLAINT SATISFIES FEDERAL RULE OF CIVIL PROCEDURE 8 BECAUSE IT IDENTIFIES A CLAIM FOR WHICH RELIEF COULD BE GRANTED AND PROVIDES FAIR NOTICE OF THE FACTUAL CIRCUMSTANCES GIVING RISE TO THE CLAIM

A. Petitioner's Complaint Provides Fair Notice Of His Claim For Relief

Under Federal Rule of Civil Procedure 8(a), a complaint initiating a civil action need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[1] The Rule "mean[s] what it sa[ys]." *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). A claimant need not "set out in detail the facts upon which he bases his claim." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Rather, the complaint need only

[1] Rule 8(a) also requires a complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends," and "a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a)(1), (3). It is undisputed that petitioner's complaint satisfies those requirements. See J.A. 22a-23a, 29a-30a.

provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Ibid.* Accordingly, in evaluating the sufficiency of a complaint, the court's role "is necessarily a limited one," confined to evaluating "not whether a plaintiff will ultimately prevail," *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), but "whether the claimant is entitled to offer evidence to support the claims," *ibid.*[2]

Taking the allegations of the complaint as true (see *Berkovitz* v. *United States*, 486 U.S. 531, 540 (1988)), petitioner's complaint satisfies that standard. The complaint repeatedly identifies the claim for relief as one of employment discrimination on the basis of national origin and age and cites the specific state and federal statutory provisions under which relief is sought. J.A. 22a ("This is an employment discrimination action" for "the violation of his rights under Title VII * * *[,] the Age Discrimination in Employment Act * * *," and state law.), 23a (describing EEOC complaint), 25a (alleging that plaintiff was demoted "on account of his national origin (Hungarian) and his age (he was 49 at the time)"), 26a (complaining of "two years of ongoing discrimination on account of his national origin and age"), 27a (asserting that "age and national origin were motivating factors in [respondent's] decision to terminate his employment"), 28a (alleging violation of petitioner's "rights under Title VII and the ADEA by discharging him from employment on account of his age

[2] This case does not involve the common, alternative basis for a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6)—the contention that, accepting the factual allegations of the complaint as true, a legal defect in the plaintiff's case (such as a constitutional challenge to the underlying law or a dispute over the proper construction of a statute) precludes recovery.

and national origin"), 28a-30a (alleging violations of Title VII, the ADEA, and two state laws, and seeking relief authorized by those laws).[3]

The complaint, moreover, provides fair notice of the factual circumstances giving rise to petitioner's claims. The complaint identifies the specific adverse employment actions at issue, provides a general time frame for the alleged violations, and offers sufficient factual context to permit the defendant to identify the events and participants implicated by the litigation. See J.A. 24a-27a.

In *Conley*, *supra*, this Court had "no doubt" that a complaint containing similar allegations of discriminatory treatment "adequately set forth a claim and gave the respondents fair notice of its basis." 355 U.S. at 48; see also Complaint, Rec. Tr. 3-16, *Conley* v. *Gibson*, 355 U.S. 41 (1951) (No. 7) (alleging failure of union properly to represent the plaintiffs and asserting that race discrimination motivated the discriminatory treatment). As in *Conley*, once petitioner's complaint put the defendant on notice of the legal and factual bases of his claim for relief, "the Federal Rules * * * d[id] not require [him] to set out in detail the facts upon which he bases his claim." 355 U.S. at 47.[4]

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[3] Rule 8(a)(2) does not require a plaintiff to "plead law" or to identify a particular legal theory in the complaint. *Krieger* v. *Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000); see also *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989) ("[U]nder Fed. R. Civ. P. 8 it is not necessary that a legal theory be pleaded in the complaint."). The complaint need only "set[] forth sufficient factual allegations to state a claim showing that he is entitled to relief under *some* viable legal theory." *Fitzgerald*, 882 F.2d at 589 (internal quotation marks omitted).

[4] See also *Dioguardi* v. *Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (where complaint, "however inartistically," fairly "disclose[s] his claims," the plaintiff may not "properly be deprived of his day in court"), cited with approval in *Conley*, 355 U.S. at 46 n.5, and *Haines* v. *Kerner*, 404 U.S. 519, 521 (1972); cf. Fed. R. Civ. P., App., Form 5 (complaint for goods sold and delivered is sufficient to state a claim for relief if it says: "Defendant owes plaintiff __ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936"), *id.*, Form 9 (complaint for negligence sufficient if it identifies the date and location of an accident and alleges only that "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway" and identifies the injuries suffered); see generally *id.*, Forms 3-14.

Indeed, given the content of the ten-page complaint, neither the court of appeals nor respondent ever seriously contended that it lacked adequate notice of the nature and character of petitioner's complaint or the events giving rise to the litigation. Nor has it been suggested that the complaint is too ambiguous, vague, or confusing to permit respondent to answer the charges and initiate a defense. To the contrary, respondent's prompt production of evidence that it believes counters the merits of petitioner's claims—*viz.*, petitioner's April 1997 memorandum to respondent's chief executive officer seeking severance benefits (J.A. 34a-36a)—belies any claim that respondent lacks "fair notice" of the claims against it.

The essence of respondent's objection, instead, is that, in light of the complaint's conclusory allegations of discriminatory motive, petitioner will not be able to prove his case on the merits. Rule 9(b), however, expressly permits plaintiffs to aver generally "[m]alice, intent, knowledge, and other condition[s] of mind of a person." Moreover, nothing in Rule 8 compels plaintiffs to establish in their complaints that they not only have a tenable claim for relief, but also have the better of the

argument on the facts. See *Scheuer*, 416 U.S. at 236 ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."); see also *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (Rule 8(a)(2) is not a "tool[] by which factually insufficient claims or defenses could be isolated and prevented from going to trial."). Nor is a motion to dismiss for failure to state a claim, under Federal Rule of Civil Procedure 12(b)(6), an appropriate "device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint." *ACLU Found.* v. *Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991).[5]

It is, of course, possible for a plaintiff to plead himself out of a cause of action by alleging facts that conclusively foreclose relief. See, *e.g.*, *Sparrow* v. *United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) ("In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible."). That would occur if, for example, the complaint revealed that petitioner's age was 35 and thus that he did not fall within the class protected by the ADEA.

[5] Numerous courts of appeals have recognized the limited demands that Rule 8 imposes on plaintiffs. See, *e.g.*, *Weston* v. *Pennsylvania*, 251 F.3d 420, 430 (3d Cir. 2001) (even though plaintiff's allegations were not "compelling," his complaint "suffice[d] to state a Title VII claim"); *Sparrow* v. *United Air Lines, Inc.*, 216 F.3d 1111, 1117 (D.C. Cir. 2000) (complaint was sufficient under Rule 8(a)(2) even though it was "doubtful" whether plaintiff will be able to establish that defendant's explanation was pretextual); *Bennett* v. *Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint does not fail to state a "claim upon which relief can be granted" simply "because it does not set forth a complete and convincing picture of the alleged wrongdoing").

The allegations in petitioner's complaint that a discriminatory demotion and "two years of ongoing discrimination on account of his national origin and age" (J.A. 26a) precipitated his discharge, however, cannot fairly be construed as foreclosing all possibility of relief.

B. Proof Establishing The Elements Of A Prima Facie Case Is Not Required

The court of appeals dismissed the complaint because petitioner failed to plead the elements of a prima facie case under Title VII and the ADEA. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court identified four elements that allow a plaintiff to establish a prima facie case of disparate treatment under Title VII through the use of circumstantial evidence. Specifically, a prima facie case under *McDonnell Douglas* entails a showing that (i) the plaintiff is a member of a protected class (such as a racial minority); (ii) he is qualified for the position in question; (iii) he suffered an adverse employment action, and (iv) after the adverse action, the employer continued to seek applicants sharing the complainant's general qualifications. See *id.* at 802; see also *Reeves* v. *Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000) (assuming, without deciding, that the *McDonnell Douglas* framework applies to ADEA claims). The court of appeals fundamentally erred in transporting the concept of a prima facie case to the pleading stage of litigation, for three reasons.

First, the court's test confuses pleading standards and evidentiary burdens of proof. The *McDonnell Douglas* framework does not purport to prescribe the proper content of a complaint. Rather, it "set[s] forth the basic allocation of burdens and order of presentation of *proof*" applicable in an employment dis-

crimination case. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252 (1981) (emphasis added). As such, the prima facie case provides "a sensible, orderly way to evaluate the *evidence* in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (emphasis added).

The test for the sufficiency of a complaint at the pleading stage is not one of evidentiary production or persuasion, but simply of notification. A complaint suffices under Rule 8(a) if it affords the defendant "fair notice" of what the plaintiff's "claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The proper question to ask at the pleading stage thus is not whether the plaintiff has satisfied some threshold level of persuasiveness, but whether the plaintiff has identified a claim for relief under which he "is entitled" to go forward and "offer evidence to support the claim[]." *Scheuer*, 416 U.S. at 236; see also *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (question at motion to dismiss stage is whether the allegations in the complaint, "however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence").

Second, the court of appeals' rule is difficult to reconcile with this Court's consistent rejection of heightened pleading standards for complaints. In *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit, supra*, this Court reversed a court of appeals' requirement that plaintiffs plead "with factual detail and particularity" cases against municipalities under 42 U.S.C. 1983. 507 U.S. at 167. The Court explained that "it is impossible to square" such a "heightened pleading standard" with "the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168. See also *Conley*, 355 U.S. at 47 (rejecting requirement that a

complaint "set forth specific facts to support its general allegations of discrimination"); cf. *Celotex Corp.*, 477 U.S. at 327 ("with the advent of 'notice pleading,' the motion to dismiss seldom fulfills th[e] function" of dispensing with "factually insufficient claims"). The enhanced pleading requirement imposed on employment discrimination plaintiffs by the court of appeals here suffers the same infirmity.

In a similar vein, courts of appeals generally have held, in a variety of litigation contexts, that a complaint need not articulate facts supporting each and every element of the claim for relief. See, *e.g.*, *Roe* v. *Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) ("[T]he liberal 'notice pleading' standards embodied in Federal Rule of Civil Procedure 8(a)(2) do not require that a plaintiff specifically plead every element of a cause of action.") (suit against abortion providers under Freedom of Access to Clinic Entrances Act); *Krieger* v. *Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) ("complaints need 'not plead law or match facts to every element of a legal theory'") (Privacy Act suit). With respect to employment discrimination claims in particular, most courts of appeals to address the issue likewise have held that a complaint need not allege facts sufficient to establish a prima facie case of discrimination. *Sparrow*, 216 F.3d at 1115; *Powell* v. *Ridge*, 189 F.3d 387, 394 (3d Cir.), cert. denied, 528 U.S. 1046 (1999); *Ortez* v. *Washington County*, 88 F.3d 804, 808 (9th Cir. 1996); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F.2d 924, 926-927 (8th Cir. 1993); accord *Bennett*, 153 F.3d at 518 ("'I was turned down for a job because of my race' is all a complaint has to say."); but see *Jackson* v. *City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999).

The court of appeals' emphasis on the *McDonnell Douglas* factors is particularly problematic because those factors do not constitute the elements of a discrimination claim in any strict sense, nor are they the exclusive means by which a plaintiff may establish a prima facie claim of discrimination. As this Court has cautioned, the *McDonnell Douglas* framework "is not necessarily applicable in every respect in differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13. In fact, the *McDonnell Douglas* prima facie case does not apply to disparate impact claims,[6] and a plaintiff with direct, rather than circumstantial evidence of disparate treatment, may establish his prima facie case with a different showing. Further, this Court has as yet to hold that the *McDonnell Douglas* framework applies to the ADEA at all. *Reeves*, 530 U.S. at 142.

Instead, the inquiry into the existence of a prima facie case in all cases reduces to whether the plaintiff has produced "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (emphasis and brackets omitted). That standard is appropriate for evaluating a record at the summary judgment or trial stage, when discovery has developed and clarified the parties' claims. But it would be precipitate to undertake such an inquiry before discovery commences. The parties' arguments and the court's analysis would have

[6] To establish a prima facie case of disparate impact, the plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. See *Byrnie* v. *Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111 (2d Cir. 2001).

to anticipate what facts and evidence the discovery process might unearth. As a result, motions to dismiss based on the plaintiff's alleged inability to demonstrate a prima facie case could frequently prove to be little more than dress rehearsals for the true battle to come at the summary judgment stage, further postponing the "just, speedy, and inexpensive determination" (Fed. R. Civ. P. 1) of cases on their merits.

Third and most significantly, the court's rule undermines the core purpose of Rule 8, which is to simplify and demystify the art of pleading. One of the "basic philosophies of the federal rules" is "simplicity of procedure." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1182, at 12 (2d ed. 1990). Earlier federal pleading regimes imposed a variety of technical requirements on complaints and placed great weight on the factual content of the plaintiff's allegations. See *Gilbane Bldg. Co.* v. *Federal Reserve Bank of Richmond*, 80 F.3d 895, 900 (4th Cir. 1996) (discussing the former "code pleading's formalistic, purely factual approach" and the "murky code-pleading requirement that a claimant plead ultimate facts and avoid pleading evidence and conclusions of law").[7]

Under the modern federal rules, however, pleadings "are not an end in themselves." 5 *Federal Practice and Procedure* § 1182, at 13. "[T]echnical forms of pleading are not required." *Id.* § 1202, at 68; see also Fed. R.

[7] See also 5 *Federal Practice and Procedure* § 1202, at 68-69 (under code pleading, "[t]he complaint not only gave notice of the nature of plaintiff's case but also was required to state the facts constituting the cause of action"; "[f]ailure to incorporate an essential allegation might lead to a speedy end of the litigation by way of demurrer or a motion to dismiss"); R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 175 (1952) (discussing disadvantages of the code pleading system).

Civ. P. 8(e)(1). Rather, Rule 8 is "designed to discourage battles over mere form of statement and to sweep away the needless controversies which the [predecessor] codes permitted," so that parties can proceed directly and more efficiently to resolving cases on their merits. *Id.* § 1201, at 67 n.11 (Advisory Comm. 1955 Report); see also *Conley*, 355 U.S. at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."). The modern rules thus dramatically eased the pressure on plaintiffs to include particularized and regimented factual allegations in their complaints.

> "Under the Rules . . . a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings." Thus, the function of a pleading in federal practice is to inform a party of the nature of the claims and defenses being asserted against him and the relief demanded by his adversary.

5 *Federal Practice and Procedure* § 1182, at 13 (quoting *De Loach* v. *Crowley's, Inc.*, 128 F.2d 378 (5th Cir. 1942)) (footnotes omitted).[8]

In fact, the Advisory Committee on the Civil Rules expressly rejected the approach employed by the Second Circuit here. In 1952, the Advisory Committee refused to adopt a proposed amendment to Rule 8(a)(2) that would have added a requirement that the state-

[8] See also 5 *Federal Practice and Procedure* § 1202, at 69 ("The only function left to be performed by the pleadings alone is that of notice. Thus, pleadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon.").

ment of the claim "contain the facts constituting a cause of action." See "Claim or Cause of Action: A Discussion of the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure," 13 F.R.D. 253 (1952).[9] That proposal was made in the wake of decisions—including, ironically, a particularly controversial decision by the Second Circuit—holding that, under Rule 8(a)(2), "there is no pleading requirement of stating facts sufficient to constitute a cause of action." *Dioguardi* v. *Durning*, 139 F.2d 774, 775 (2d Cir. 1944); see also "Claim or Cause of Action," 13 F.R.D. at 254 n.1, 261.

In rejecting the proposed amendment, the Committee explained that the current practice of permitting general descriptions of the claim "adequately sets forth the characteristics of good pleading" and "does away with the confusion resulting from the use of 'facts' and 'cause of action.'" 5 *Federal Practice and Procedure*, § 1201, at 67 n.11. As one opponent of the proposed amendment cautioned:

> Once again we will find ourselves engaged in the time-consuming and frustrating process typified by the interminable attacks upon litigants' claims upon the ground that, *under common-law concepts, a cause of action has not been* stated. Again the technical forces will be marshalled for the never ending exploitation of all the common-law devices to drag out the pleading stage of litigation and delay the litigants' day in court.

[9] See also 5 *Federal Practice and Procedure* § 1216, at 164; 2 J. Moore, *Moore's Federal Practice and Procedure* § 8App.01[3] (2001); Millar, *supra*, at 190-193 (discussing debate over whether Rule 8 requires the pleading of a cause of action).

"Claim or Cause of Action," 13 F.R.D. at 274-275; see also R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 193 (1952) (explaining that requiring facts consituting a cause of action is inconsistent with notice pleading).

The court of appeals' requirement that a complaint allege all of the facts constituting a prima facie case—and in particular identify all the "circumstances that give support to an inference of discrimination" (Pet. App. 3a)—likewise would resurrect the very confusion, complication, and prolixity that Rule 8 was designed to eliminate. The decision would encourage plaintiffs to file complaints "lard[ed] * * * with facts and legal theories," *Bennett* v. *Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998), in order to anticipate and protect against dismissal of any potential grounds for relief that discovery and the litigation process might uncover.

Like code-pleading, the court of appeals' rule also would erect a "daunting hurdle" for plaintiffs by requiring them to amass evidence of a prima facie case before discovery. *Powell*, 189 F.3d at 396. Facts pertaining to an employee's past performance or an employer's actions subsequent to the adverse employment action, for example, often will be in the hands of the employer. In particular, evidence relevant to the fourth *McDonnell Douglas* factor—that, after the adverse employment action, the employer continued to seek applicants sharing the plaintiff's general qualifications —will uniquely be in the defendant's possession. Statistical information relevant to establishing a prima facie case of disparate impact also will often be largely within the employer's ken. See *ibid.* (noting difficulties that would arise if plaintiffs were required "at the pleading stage, before answers have been filed and before discovery, to identify" the specific part of de-

fendant's "complex funding formula" that created the adverse effect); *Gilligan* v. *Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997) ("without any responsive pleadings or record evidence," plaintiffs did not have facts they needed to allege all the elements of a prima facie case).[10] Employment discrimination plaintiffs, no less than other plaintiffs proceeding in federal court, "are entitled to discovery before being put to their proof." *Bennett*, 153 F.3d at 519.[11]

The court of appeals' rule, although legally untenable, appears motivated by the understandable desire to terminate insubstantial litigation at the earliest possible stage. This Court has already held, however, that generally "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."

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[10] To be sure, the shifting burdens of proof and production under the *McDonnell Douglas* framework, in part, reflect judgments about which party, after discovery has concluded, may reasonably be charged with producing the relevant information at the summary judgment or trial stages of litigation. However, that framework has never purported to identify which party controls evidence bearing on the critical facts at the very outset of the case. Indeed, how the *McDonnell Douglas* framework operates and what facts are available to a plaintiff to establish a prima facie case could change significantly if discovery reveals that the case involves a mixed-motive employment action (see *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989)), or an after-acquired evidence case (see *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995)).

[11] See also *Estelle* v. *Gamble*, 429 U.S. 97, 112-113 n.7 (1976) (Stevens, J., dissenting) ("[T]he decision on the merits of the complaint should normally be postponed until the facts have been ascertained."); cf. Fed. R. Civ. P. 56(f) (permitting court to grant continuance where a party shows that discovery is necessary before responding to a summary judgment motion).

Leatherman, 507 U.S. at 168-169. In addition, the Federal Rules allow district courts to order the clarification of pleadings to facilitate the filing of responsive pleadings and motions. See Fed. R. Civ. P. 7(a) (authorizing a court-ordered reply to an answer), 12(e) (motion for a more definite statement).[12]

C. This Case Does Not Implicate The Special Considerations Governing Pleadings In Qualified Immunity Cases

This is a case between private parties arising under federal statutory law, where the conventional rules of federal civil litigation clearly apply.[13] The case thus does not present the question whether some enhanced pleading standard or special procedures are appropriate

[12] Even if a complaint suffers from some factual deficiency, the proper remedy is usually to allow leave to amend or to grant a motion for a more definite statement under Federal Rule of Civil Procedure 12(e), rather than to dismiss the case with prejudice. See *Conley*, 355 U.S. at 48 & n.9 (noting that Rule 12(e), among others, establishes the procedures for "narrowly" defining "the disputed facts and issues"); *Roe* v. *Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001) (dismissal with leave to amend); *Bennett*, 153 F.3d at 518 (the district court should "keep the case moving—if the claim is unclear, by requiring a more definite statement under Rule 12(e)"); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1351 (2d Cir.) ("We would be acting contrary to the spirit of the Federal Rules if we did not recognize the ease with which the complaint may be amended under these Rules to supply any additional allegations required to make the complaint more informative."), cert. denied, 417 U.S. 932 (1974).

[13] See *Price Waterhouse*, 490 U.S. at 253 ("Conventional rules of civil litigation generally apply in Title VII cases."); *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 150 (1984) (per curiam) (finding "no persuasive justification for [the] view that the Federal Rules of Civil Procedure were to have a different meaning in, or were not to apply to, Title VII litigation").

for implied causes of action brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual government officials who assert a defense of qualified immunity. Nor does it present questions concerning what level of detail must be alleged before a senior government official may be questioned about his or her actions in such a case.

This Court has recognized that qualified immunity cases raise special concerns because the "entitlement is an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); see also *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001). There is substantial tension between Rule 8's command of simplified pleading, which generally defers merits determinations to the discovery and summary judgment phases of litigation, and the qualified immunity doctrine's protection against the burdens of discovery and trial, which necessitates that "insubstantial lawsuits * * * be quickly terminated," *Crawford-El* v. *Britton*, 523 U.S. 574, 590 (1998). See also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819-820 n.35 (1982) ("Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and firm application of the Federal Rules of Civil Procedure is fully warranted in such cases.") (internal quotation marks omitted).[14]

[14] This Court has recognized the substantial social costs that attend damage actions against individual government officials:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.

In *Leatherman*, this Court expressly reserved the question "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 507 U.S. at 167. Furthermore, in *Crawford-El*, in the course of invalidating the application of a heightened evidentiary (as opposed to heightened pleading) standard in cases alleging unconstitutional motive, the Court instructed that trial courts "must exercise [their] discretion in a way that protects the substance of the qualified immunity defense * * * so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." 523 U.S. at 597-598. The Court suggested that, whether by ordering a reply to an answer under Federal Rule of Civil Procedure 7(a), or granting a motion for more definite statement under Federal Rule of Civil Procedure 12(e), trial courts in *Bivens* actions "may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive * * * in order to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El*, 523 U.S. at 598.[15]

Harlow, 457 U.S. at 814 (internal quotation marks omitted). In particular, "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues * * * can be peculiarly disruptive of effective government" and, if the suit is against a high-level government official, "could implicate separation-of-powers concerns." *Id.* at 817 & n.28. See also *Smith* v. *Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986) (Scalia, J., Circuit Justice).

[15] See also *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring) (heightened pleading standard is appropriate because the "substantive defense of immunity controls" over the "usual pleading requirements"); *Judge* v. *City of Lowell*, 160 F.3d 67, 72-75 (1st Cir. 1998) (imposing particularized pleading requirement in qualified immunity cases); *Schultea* v. *Wood*, 47 F.3d 1427, 1433-1434 (5th Cir. 1995) (en banc) (requiring replies, under Federal Rule of Civil Procedure 7, to a defendant's invocation of qualified immunity). A similar rule likely would apply to invocations of qualified immunity by state officials in actions under 42 U.S.C. 1983. See *Butz* v. *Economou*, 438 U.S. 478, 500 (1978).

Accordingly, while the Court should reverse the court of appeals' holding that plaintiffs in employment discrimination cases arising under federal statutory law must plead the elements of a prima facie case, the Court should reserve the question of what supplementary standards or procedures properly apply at the pleading stage in qualified immunity cases.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,
Petitioner,
v.
SOREMA, N.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy to provide legal representation to the victims of civil rights violations.[1] Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Department of Justice, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last 38 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.[2]

SUMMARY OF ARGUMENT

In the case below, the Second Circuit improperly applied a heightened pleading requirement to affirm dismissal of a complaint that fully satisfies the notice pleading standards set forth in the Federal Rules of Civil Procedure, as well as the standards that this Court enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957). It is apparent from

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[1] This brief was not authored, in whole or in part, by any counsel for a party. No person or entity, other than the *amicus curiae*, its members, or counsel contributed monetarily to the preparation or submission of this brief.

[2] Petitioner and Respondent have consented to the filing of this brief, pursuant to Rule 37.3 of The Rules Of The Supreme Court Of The United States. Copies of the parties' letters providing such consent are submitted herewith.

the Second Circuit's decision in *Swierkiewicz* and elsewhere that courts are frequently holding to a heightened pleading standard complaints that allege discrimination or violations of civil rights.

This unwarranted departure from the standards of notice pleading in cases brought under civil rights laws works irreparable injustice against civil rights plaintiffs who at the pleading stage do not have access to the formal discovery needed to adduce evidence to support their claims. By demanding that civil rights plaintiffs include in their complaints facts demonstrating an intent to discriminate – facts which typically can be discovered only after examining evidence that is in the sole control of the defendant – the Second Circuit essentially analyzes civil rights actions at the pleading stage under a scrutiny typically reserved for summary judgment motions.

The analysis in the lower courts in this case is especially troubling because the plaintiff pled sufficient facts to survive summary judgment. The plaintiff expressly pled facts to establish the four elements of the *prima facie* discrimination case: (1) he is a member of a protected class; (2) he was otherwise qualified for the position; (3) he was discharged; and (4) circumstances surrounding the employment action give rise to an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Further, Swierkiewicz is not an isolated decision. In other cases, too, the Second Circuit has failed to follow this Court's guidance when evaluating the factual bases of discrimination claims. The net effect of these decisions is to close the courts to civil rights plaintiffs before they have had the right to take formal discovery, and thereby to thwart the legislative intent of the civil rights laws.

I. THE HEIGHTENED PLEADING REQUIREMENT IMPOSED BY THE SECOND CIRCUIT CONTRAVENES THE FEDERAL RULES OF CIVIL PROCEDURE AND BINDING PRECEDENT OF THIS COURT

When the Federal Rules of Civil Procedure were adopted in 1938, federal court practice underwent a fundamental shift in the method of pleading. Prior to 1938, when a plaintiff filed suit, he or she was required to state the facts supporting his or her claim. With the Federal Rules, the federal courts implemented a system of notice pleading, whereby a plaintiff need only state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In the instant case, the Second Circuit has turned back the clock to 1937 by improperly holding the plaintiff to the heightened standard of fact pleading. Specifically, the Second Circuit dismissed the plaintiff's Complaint, holding that he did not allege facts to make a *prima facie* showing of intent to discriminate under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). By demanding that plaintiff allege facts demonstrating intent, the lower court invoked an analysis that is exclusively reserved for evaluating Motions for Summary Judgment.

As this Court explained in the context of actions brought against municipal governments, absent amendment of the Federal Rules, heightened pleading standards are only appropriate in the context of actions sounding in fraud. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993). For all other actions, Rule 8(a)(2) merely requires a plaintiff to set out "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As the *Leatherman* Court noted:

> [p]erhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). . . .In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Leatherman, 507 U.S. at 168-69. The same analysis applies to the civil rights actions at issue here. There is no provision of law or rule that requires a plaintiff to allege facts sufficient to withstand summary judgment in the complaint. Such a requirement would constitute a return to fact pleading, a system that was rejected 63 years ago.

If its ruling were to stand, the Second Circuit would require plaintiffs to allege facts sufficient to withstand the summary judgment evidentiary standard applicable in civil rights cases set forth by this court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In doing so, the Second Circuit effectively closes the courtroom doors to civil rights plaintiffs because the kind of factual detail required by the court here – evidence of motive or intent – is typically available only through discovery. The Second Circuit's decision contravenes this Court's plain ruling in *Conley v. Gibson*, 355 U.S. 41 (1957), also a discrimination case, where this Court stated:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules

> require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47 (footnote omitted).

Swierkiewicz, the plaintiff in the instant case, not only meets, but exceeds the *Conley* standard. His amended complaint states four counts upon which relief could be granted, covers 49 paragraphs of legal and factual allegations, has a plain statement of the court's jurisdiction, and contains a prayer for relief. Thus, the three requirements of Rule 8(a) are more than satisfied. Swierkiewicz specifically alleges that Sorema terminated his employment on account of his national origin and age. *See* Am. Compl. ¶¶ 43, 45. Defendants are therefore on notice of plaintiff's claims and can expect to use discovery to understand the factual underpinnings of those claims. The Federal Rules require nothing more.

In holding Swierkiewicz to a higher pleading bar than that required by notice pleading, the United States Court of Appeals for the Second Circuit effectively and erroneously conflated the standard for a motion for summary judgment with that for a motion to dismiss. Furthermore, the application of a quasi-summary judgment standard at the early stage in the litigation process improperly deprived Swierkiewicz of the important opportunity to utilize discovery to uncover facts in support of his allegation that Sorema terminated him because of his national origin and/or age.

A. The Federal Rules Of Civil Procedure Explicitly Reject The Old Strictures Of Fact Pleading In Favor Of Notice Pleading.

Before the adoption of the Federal Rules of Civil Procedure (the "Federal Rules") in 1938, pleadings served to identify and resolve the merits of the claim being litigated. In order to fulfill this purpose, a complaint had to contain a statement of the facts constituting the cause of action. Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 438 (1986). However, fact pleading "invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper). In particular, there was great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership and execution, contain a mixture of historical fact and legal conclusion." *Id.* at 438 (footnote omitted).

Conversely, the Federal Rules require only that a complaint contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). As this Court has stated, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Leatherman*, 507 U.S. at 168 (*quoting Conley*, 355 U.S. at 47). Rather than providing a vehicle through which courts can determine the validity of claims, modern complaints serve the purpose of "giv[ing] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The Conley Court went on to say, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48.

Official Form 9 of the Federal Rules illustrates the lenient nature of notice pleading. Form 9 provides an example of a hypothetical complaint for negligence. In that model complaint, the plaintiff merely pleads that on a certain date, at a certain place, "defendant negligently drove a motor vehicle against plaintiff." Fed. R. Civ. P. app. Form 9. The complaint in Form 9 contains no further factual allegations to support the legal conclusion that the defendant acted negligently because, under notice pleading, no such recitation of facts is necessary. "The complaint [only] ha[s] to indicate the nature of the plaintiff's claim with only enough specificity to enable the parties to determine the preclusive effect of a judgment disposing of the claim." *Am. Nurses' Assoc. v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986).

The United States Court of Appeals for the Second Circuit clearly erred in examining Swierkiewicz's complaint for a specific factual allegation that showed intent to discriminate. The court noted that Swierkiewicz's complaint contained an "allegation that his termination was motivated by . . . discrimination," yet found this to be insufficient. *Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63, 64, Appendix to Petition for Writ of Certiorari ("Cert. App.") at 3a (2d Cir. 2001) (unpublished). Under notice pleading, Swierkiewicz had no obligation to plead any facts supporting the allegation that Sorema acted in a discriminatory manner, just as the hypothetical plaintiff in Form 9 had no obligation to plead any facts supporting the allegation that defendant acted in a negligent manner. *See Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) ("'I was turned down for a job because of my race' is all a complaint has to say" under notice pleading.). Further, the essence of proof in employment discrimination cases typically will be within the sole control of the defendant. In order to infer the intent and motive of the employer, the jury will be presented with the employer's records and other materials, obtained during discovery. It is thus even more important in these cases that

a party be afforded the chance to proceed to discovery when his or her complaint meets the basic requirements of notice pleading.

B. The Purpose Of Notice Pleading Is Reflected In The Differing Standards For Evaluating Motions To Dismiss And Motions For Summary Judgment.

Under fact pleading, the demurrer, the antecedent of the Rule 12(b)(6) motion to dismiss, was the principal tool for probing the evidentiary basis for a plaintiff's factual conclusions. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This was proper because, under fact pleading, complaints were to have contained all the facts necessary to support the allegations. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1355 (2d ed. 1990).

Conversely, "[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or merits of the case." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1356 (2d ed. 1990). The limited role of the motion to dismiss reflects a determination by the drafters of the Federal Rules that pleadings are an ineffective means to weigh the merits of a claim, particularly at the start of litigation, before all of the relevant facts are available to the parties. *See* Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U. L.Q. 297, 311-17 (1938). The proper role of the motion to dismiss also reflects the general principle adopted by the Federal Rules in favor of resolution of cases on their merits. *See* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice").

II. IN IMPOSING A HEIGHTENED PLEADING STANDARD, THE COURT OF APPEALS IMPERMISSIBLY CONFLATED THE STANDARD APPLICABLE TO A MOTION TO DISMISS WITH THAT OF A MOTION FOR SUMMARY JUDGMENT

The Federal Rules provide an alternative method for the early resolution of claims on their merits — the Rule 56 motion for summary judgment. Whereas a motion to dismiss "does not challenge the actual existence of a meritorious claim," a motion for summary judgment "is on the merits." 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2713 (3d ed. 1998). As the United States Court of Appeals for the Seventh Circuit has noted:

> The Rules of Civil Procedure make a complaint just the starting point. Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving — if the claim is unclear, by requiring a more definite statement under [Fed. R. Civ. P.] 12(e), and if the claim is clear but implausible, by inviting a motion for summary judgment.

Bennett, 153 F.3d at 518. Indeed, since the complaint now only serves to give notice to the defendant, the Federal Rules provide various mechanisms other than Rule 12(b)(6) to narrow the issues and facts of a case and dispose of frivolous claims. These other mechanisms include not only Rule 56, but also Rule 11 (requiring a reasonable inquiry), Rule 12(e) (motion for a more definite statement), Rule 16 (pretrial conferences), and Rules 26 through 37 (discovery management).

The United States Court of Appeals for the Second Circuit clearly erred by using the motion to dismiss to test

the merits of Swierkiewicz's claims. The question whether Swierkiewicz has sufficient evidence to show that he was terminated because of his national origin and/or age goes directly to the merits of his claims. Therefore, examination of that question is only appropriate under Rule 56, not Rule 12(b)(6). *See* Fed. R. Civ. P. 56 advisory committee note, 1963 amend. ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.").

A. The Use Of A Heightened Pleading Standard In Civil Rights Cases Conflates The Standards Of Motions To Dismiss And Motions For Summary Judgment.

As one commentator noted, "there often is confusion in distinguishing [between] the motion for summary judgment [and] the motion to dismiss for failure to state a claim." 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2713 (3d ed. 1998). The improper application of heightened pleading standards in civil rights cases has exacerbated this confusion. By wrongly applying a heightened pleading standard to civil rights cases, the lower courts misuse Rule 12(b)(6) to examine the factual and evidentiary allegations to determine if a "genuine issue of material fact" exists. But that inquiry is within the rubric of Rule 56 and is to be directed at an examination of the evidence gathered during discovery. In short, lower courts impermissibly are entering summary judgment against civil rights plaintiffs on the complaint. This practice has forced civil rights plaintiffs regularly to attach affidavits and exhibits to their briefs opposing dismissal in an attempt to make an evidentiary showing in support of their allegations before they have had an

opportunity to develop their evidence through the discovery process.[3]

The federal courts' impulse to utilize some procedural mechanism for assessing the factual validity of a civil rights claim at the pleading stage may be understandable. Many federal courts strive to reduce the burden on the courts and defendants. *See, e.g., Judge v. City of Lowell*, 160 F.3d 67, 72 & n.3 (1st Cir. 1998). Indeed, one commentator has gone so far as to suggest that many courts believe that "[t]he vast majority of civil rights actions are frivolous." Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 Wm. & Mary L. Rev. 935, 960 (1990). However, regardless of the reasons behind heightened pleading standards, it is improper to require claimants to provide more detailed factual allegations in the complaint than is required by the Federal Rules. As the United States Court of Appeals for the Fourth Circuit wrote:

> We realize how a harried trial judge, burdened by a heavily congested docket, will seek to expedite the disposition of cases on his overcrowded docket, but while the expeditious and efficient processing of litigation is laudable and should be encouraged, it must be remembered . . . that

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[3] In situations in which heightened pleading standards are not required by Rule 9(b), "[t]actically, the pleader is unlikely to initiate the introduction of outside material because if he does, the Rule 12(b)(6) motion, which is rarely granted on the merits, will be converted into a motion for summary judgment and may result in a binding final determination against him." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1366 (2d ed. 1990).

> the Federal Rules provide an adequate and orderly procedure for the summary dismissal of complaints which fail to state a claim on which relief can be granted, Rule 12; and for summary judgment . . . Rule 56 . . . . Only by adherence to the spirit of these rules can we be sure of a full hearing, the essence of due process.

Gellman v. Maryland, 538 F.2d 603, 606 (4th Cir. 1976) (internal quotations and citations omitted).

Swierkiewicz alleged in his complaint all that the Federal Rules require. He provided a description of his cause of action. The allegations in the complaint sufficiently gave Sorema notice of allegations that Swierkiewicz was terminated because of his national origin and/or age. *See Walker v. S. Cent. Bell Tel. Co.*, 904 F.2d 275, 277-78 (5th Cir. 1990). The lower courts, by examining the complaint for specific facts beyond those providing notice of a discrimination claim, including Swierkiewicz' allegation of discriminatory intent, effectively applied the standard for a motion for summary judgment in the context of a motion to dismiss. Stated another way, the lower courts' application of a heightened pleading standard required Swierkiewicz to make a showing similar to that required of plaintiffs in the days of fact pleading before the adoption of the Federal Rules. *See also* Fed. R. Civ. P. 9(b) ("[I]ntent . . . may be averred generally.").

B. The Conflation Of Standards For Motions To Dismiss And Motions For Summary Judgment Disproportionately Impacts Plaintiffs In Civil Rights Cases.

The scope of discovery pursuant to Rule 26(b) of the Federal Rules extends widely to "any matter, not privileged,

that is relevant to the claim or defense of any party. . . ." Fed. R. Civ. P. 26(b)(1). The Advisory Committee Notes to the 1946 Amendment to Rule 26(b) emphasize that:

> The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. *The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.*

Fed. R. Civ. P. 26(b) advisory committee notes, 1946 amend. (emphasis added). Shortly after the Federal Rules were adopted, one court noted that "[t]o limit an examination to matters relevant to only the precise issues presented by the pleadings, would not only be contrary to the express purposes of rule 26. . . but also might result in a complete failure to afford plaintiff an adequate opportunity to obtain information that would be useful at the trial." *Stevenson v. Melady*, 1 F.R.D. 329, 330 (S.D.N.Y. 1940).

The ability to conduct substantial, thorough discovery is particularly important in civil rights and discrimination cases. In most such cases, an individual brings suit against a corporation, organizational entity, or governmental body, challenging the policies, practices, or actions of that institution. Under this Court's jurisprudence, a civil rights plaintiff must demonstrate a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the challenged practice. *Id.* The burden then

returns to the plaintiff to demonstrate that the defendant's stated reason is pretextual. *Id.* at 803. In order to satisfy his or her burden, a civil rights plaintiff must necessarily produce evidence giving rise to an inference of the defendant's motives and justifications, and in most cases, the defendant's practices with respect to other employees and other evidence of pretext.

The federal courts have long recognized that a civil rights plaintiff's burden of production is particularly difficult in light of the imbalance in information. Evidence relating to institutional motives, justifications, and practices is almost always held exclusively by the defendant, and is often guarded even from internal disclosure. The United States Court of Appeals for the Third Circuit has commented that:

> In numerous cases the courts have recognized that an employee bringing [an employment discrimination] suit faces difficulties in amassing proof because discrimination "is often subtle." As we stated, "[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered."

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998) (citations omitted).

The United States Court of Appeals for the Seventh Circuit has also noted that civil rights plaintiffs have an acute need to conduct discovery, stating:

> [A]ge discrimination may be subtle and even unconscious. Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up.

Oxman v. WLS-TV, 846 F.2d 448, 453 (7th Cir. 1988) (citing *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984)).[4]

By requiring a heightened pleading standard, whereby civil rights plaintiffs must plead their claims "with factual detail and particularity," lower courts effectively deny plaintiffs the right to discovery needed to collect information exclusively in the possession of the defendant necessary to prove his or her case. In practice, in order to survive a motion to dismiss, courts are demanding that civil rights plaintiffs produce evidence of the factual merit of the case at a point before they have had the opportunity to engage in discovery of the defendant. By judging the merits of the case on the complaint and foreclosing access to discovery, courts deprive civil rights plaintiffs of the means of identifying, gathering, assessing, and presenting evidence essential to the proof of their claims. Such a heightened pleading standard thus frustrates the spirit and the rationale of the Federal Rules of Civil Procedure and effectively closes the courts to civil rights plaintiffs.

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[4] Other Courts of Appeals across the country have acknowledged the "information imbalance" in civil rights cases as well. *See Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997); *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997), *cert. denied*, 522 U.S. 1016 (1997); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997); *Rothmeier v. Inv. Advisors, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996); *Shealy v. City of Albany*, 89 F.3d 804, 806 (11th Cir. 1996).

III. THE COURT OF APPEALS IMPERMISSIBLY REQUIRES THE PLAINTIFF TO PLEAD MORE FACTS IN HIS OR HER COMPLAINT THAN IS NECESSARY TO SURVIVE A MOTION FOR SUMMARY JUDGMENT UNDER THIS COURT'S PRECEDENTS

It is rare that a plaintiff in a discriminatory treatment case can adduce evidence that specifically demonstrates the discriminatory animus of an employer. Recognizing that employers easily could mask the true reasons for a discriminatory employment decision, this Court established an inferential model for the presentation of proof. This framework, developed in the seminal case of *McDonnell Douglas Corp. v. Green*, creates a burden shifting model to assess claims brought under Title VII and the Age Discrimination in Employment Act. Not only did the Court of Appeals impose a heightened pleading standard and erroneously apply a Summary Judgment standard, but also failed to apply this Court's precedent regarding this inferential model of proof.

The Second Circuit affirmed the dismissal of Swierkiewicz' claims because, in its view, he had failed to allege facts sufficient to establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework. *See Swierkiewicz*, 5 Fed. Appx. at 64-65, Cert. App. at 3a-4a. It is undisputed that Swierkiewicz stated facts to establish the first three elements of the *prima facie* case, i.e., membership in a protected class, qualification for the job in question, and an adverse employment action. Trans. at 3, Cert. App. 6a. The *Swierkiewicz* court held that the plaintiff failed to assert facts to make out circumstances that give support to an inference of discrimination in both his national origin and age discrimination claims. *See id.* However, Swierkiewicz did in fact allege in his complaint that his supervisors were French (Swierkiewicz is not of French national origin) and

that his responsibilities were transferred to a French National who was 16 years younger than the plaintiff. Am. Compl. ¶ 19. Under this Court's precedent, these allegations are sufficient to satisfy the inference of discrimination element of the *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802. Additionally, Swierkiewicz alleged that his supervisors had made comments – that they were seeking to "energize" the underwriting department – from which a finder of fact could infer discriminatory intent. Am. Compl. ¶ 23, Cert. App. 2a, 4a. Thus, Swierkiewicz pled more facts than would be required to defeat a motion for summary judgment, facts that would permit the trier of fact to infer discriminatory intent.

As decisions of this court make clear, most recently in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), the federal court's role in discrimination cases is to make only an initial determination as to whether a question of fact exists for a jury to decide. However, the Court has overstepped the limits of this narrow gatekeeping authority under the guise of Motions for Summary Judgment under Federal Rule of Civil Procedure 56 and Motions for Judgment as a Matter of Law under Rule 50, often evaluating and weighing evidence in ways specifically and expressly reserved to juries. Thus, the Court's improper application of the summary judgment standard on a 12(b)(6) motion was further complicated by the application of an erroneous summary judgment standard.

A. The *McDonnell Douglas* Evidentiary Framework Does Not Grant Courts The Power To Usurp The Role Of The Jury As Finder of Fact; Indeed, It Expressly Reserves Factual Determinations For The Jury.

To proceed in a civil rights case under the inferential model, a plaintiff's claim must establish the four elements of the *prima facie* case, that: (1) he or she is a member of a protected class; (2) he or she was otherwise qualified for the position; (3) he or she was discharged or suffered other adverse employment action attributable to the employer; and (4) circumstances surrounding the employment action give rise to an inference of discrimination. *See Reeves*, 530 U.S. at 142; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Baralt v. Nationwide Mut. Ins. Co.*, 251 F.3d 10, 16 n.8 (1st Cir. 2001). If the *prima facie* standard is met, the burden shifts to the defendant to demonstrate that the employment action was taken for a legitimate, nondiscriminatory reason. *See Reeves*, 530 U.S. at 142. This burden is one of production rather than persuasion — it involves no assessment of the credibility of the evidence. *See id.* at 142-43 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). If the defendant meets this burden, the *McDonnell Douglas* framework disappears and the sole remaining issue is whether the employer's actions were discriminatory. *See Reeves*, 530 U.S. at 143.

Despite the shifting evidentiary burdens, the ultimate burden of persuasion remains with the plaintiff. *See id.* As this Court stated in Reeves, "the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Further, although the presumption of discrimination created by

meeting the *prima facie* case is eliminated when the defendant meets its burden of production, the jury may still consider the evidence used to establish the *prima facie* case in determining whether the explanation offered by the defendant is pretextual. *See id.* (citing *Burdine*, 450 U.S. at 255 n.10).

B. This Court's Decision In *Reeves* Creates A Very Specific And Circumscribed Role For The Trial Court In Discrimination Cases.

There is no doubt that judicial review of discrimination cases under Rule 50 and Rule 56, at the appropriate stage of proceedings, is an important element of the remedial framework of civil rights cases. Because discrimination is very rarely open and notorious, it seldom is provable by direct evidence; employers who discriminate often do not note in an employee's personnel file that he or she was fired because he or she was too old or because he or she was German or because he or she was black. The *McDonnell Douglas* framework attempts to solve this evidentiary conundrum by allowing juries to infer discrimination from indirect evidence. Lower courts, however, have taken an increasingly active role in evaluating evidence before allowing cases to proceed to trial (Rule 56) and in reviewing jury verdicts (Rule 50). In their vigilance, lower courts have increasingly overstepped their authority in granting judgments for the employer-defendants, despite this Court's admonition last year in *Reeves*, an error the Second Circuit compounded by conflating this erroneous standard with the standard under Rule 12(b)(6).

This Court set out in *Reeves* the standard for the use of summary judgment and judgment as a matter of law in civil rights cases. Reeves, a supervisor in Sanderson Plumbing Products' Hinge Room, brought an action for age discrimination under the Age Discrimination in Employment

Act (ADEA). Reeves offered evidence at trial that supported the *prima facie* requirements of the *McDonnell Douglas* framework. *See Reeves*, 530 U.S. at 142. Defendant, in turn, introduced evidence of a legitimate, nondiscriminatory justification for Reeves' termination, namely that Reeves had committed numerous timekeeping errors and misrepresentations in recording the attendance and hours of those employees under his supervision. *See id.* at 137-38. Reeves then introduced evidence that he had accurately recorded the hours and attendance of the employees he supervised, and that one of the supervisors who recommended Reeves' termination, "had demonstrated age-based animus in his dealings with petitioner." *See id.* at 138. Based on this evidence, the jury returned a verdict in favor of Reeves. *See id.* at 139. The district court denied the defendant's motion for judgment as a matter of law. *See id.*

The Court of Appeals for the Fifth Circuit reversed, holding that Reeves had not introduced evidence sufficient to support the jury's finding of unlawful discrimination. *See id.* The Court of Appeals held that while Reeves may have introduced sufficient evidence for a "reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual," this was not dispositive of the ultimate question of whether Reeves introduced sufficient evidence that his age motivated the decision to terminate his employment. *See id.* (quoting *Sanderson Plumbing Prods., Inc. v. Reeves*, 197 F.3d 688, 693 (5th Cir. 1999)). The Court of Appeals then answered this question in the negative after weighing Reeves' additional evidence of discrimination against other circumstances surrounding his discharge. *See id.*

This Court then reversed the Court of Appeals, holding that the evidence supporting plaintiff's *prima facie* case *plus* evidence that the defendant's asserted reasons were pretextual may support a finding of discrimination by the

ultimate finder of fact. *See id.* at 146-47. Justice O'Connor, writing for a unanimous court, wrote:

> [p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. at 147.[5]

The Court went on to distinguish between the role of district courts in evaluating evidence under Rules 50 and 56 and the role of the jury as ultimate trier of fact. The Court emphasized the well established principle that courts are to examine the record as a whole, drawing all inferences in favor of the non-moving party. *See id.* at 149-50. Moreover, the Court cautioned that:

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[5] The Court cautioned that a showing that defendant's reasons for taking action were pretextual may not be adequate to sustain a jury's verdict in all circumstances, such as where the record revealed other, nondiscriminatory reasons for the discharge or where there was only a weak issue of fact as to the pretextual nature of the employer's reason and there was uncontroverted independent evidence that no discrimination had occurred. *See Reeves*, 530 U.S. at 148. Whether to grant judgment as a matter of law in a specific case will depend on numerous factors, but this Court held that the Court of Appeals in *Reeves* was incorrect to insist that a plaintiff must *always* introduce additional evidence, separate from that used to establish the *prima facie* case and from that used to show that the proffered justifications were pretextual. *Id.* at 149.

> the court . . . may not make credibility determinations or weigh the evidence. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Id. (internal quotations and citations omitted.). *Accord St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (holding that establishing elements of inferential model and adducing evidence that the defendant's proffered reasons were false creates a fact question only to be resolved by the jury).

Reeves clearly confirms that only the jury may decide factual issues such as the credibility of witnesses and the inferences to be drawn from a party's actions or words. These cases reinforce the strict limits on the District Court's authority to weigh the evidence in discrimination cases. Once a plaintiff establishes the *prima facie* case and adduces evidence that the defendant's asserted justifications for its actions are false, a question of fact for the jury almost always exists.

C. The Plaintiff's Allegations In The Instant Case Are Sufficient To Defeat A Motion For Judgment As A Matter Of Law.

The allegations in *Swierkiwicz*, if they are supported by evidence adduced during discovery and at trial, would support a verdict for the plaintiff and would thus survive a motion for summary judgment pursuant to Rule 56. The district court acknowledged that the plaintiff had pled three of the four elements of the *prima facie* case. *See Trans.* at 3, Cert App. at 6a. The court held, however, that the circumstances of the adverse action were insufficient to support an inference of discrimination. *See id.* In so holding, the court ignored the fact that Swierkiewicz was replaced by a man of French national origin who was 32 years old and improperly weighed the import of the statement by Mr. Papadopoulo that Mr. Chavel wanted to "energize" the underwriting department. The court held the remark was too vague to be age-related, was too remote in time, unrelated to the job action at issue, and cannot be said to be directed at plaintiff or his work activities. *See id.* at 6, Cert. App. at 8a. This evaluation of the allegations by the court, especially at this early stage of the litigation, is exactly the invasion of the province of the jury that this Court prohibited in *Reeves*. Swierkiewicz has alleged that the "energize" comment is indicative of the age-based motivations of his employer. The probative value of such a comment is for the jury to decide. Its context and the surrounding discussion could suggest discrimination – as Swierkiewicz alleges – or they could show something innocuous and not actionable. The context of the remark may make all the difference and without discovery the complete context cannot be known. Whatever meaning is ultimately attributed to the comment, the plaintiff is entitled to its most favorable interpretation under Rules 50 and 56. It is completely inappropriate for the court to evaluate the probative value of a remark as a matter of law at the 12(b)(6) stage of the litigation, especially a remark

whose circumstances could well suggest the discriminatory motive of a goal to hire younger people at the expense of the plaintiff.

D. The District Courts And Courts Of Appeal Have Repeatedly Misapplied The *Reeves* Standard For Judgment As A Matter Of Law.

In the seventeen months since *Reeves* was decided the Court of Appeals has misinterpreted or ignored the plain commands handed down in a unanimous opinion of this Court. This is demonstrated by the case at bar and the following sample of relevant Second Circuit decisions.

1. *James v. New York Racing Assoc.*, 233 F.3d 149 (2d Cir. 2000)

James was hired by the New York Racing Association (NYRA) in 1989 as Assistant Security Director. *See James*, 233 F.3d at 151. In approximately 1994, NYRA. began a program of reorganizing and downsizing. In October 1996, NYRA discharged James, who was then 59, listing "downsizing" as the reason in his personnel file, and hiring a 42 year old to take over most of his responsibilities. *See id.* at 152. James claimed that downsizing was a pretextual reason for his termination, contending that because of a promotion and a new hire, there was no net downsizing. *See id.* James also pointed to remarks made by senior NYRA managers expressing hope that they could "save NYRA for the younger guys" and that there were "too many older supervisors and some of them needed to retire." *Id.*

The Second Circuit Court of Appeals affirmed the District Court's grant of summary judgment to the defendant, holding that the evidence, "taken as a whole, cannot reasonably support an inference that James's discharge was

motivated by age-based animus." *Id.* The court stated that there was "overwhelming" evidence that NYRA was engaged in a bona fide reduction in force in attempts to save operating costs to avoid bankruptcy. *Id.* The court also attributed the remarks that older employees needed to retire to a desire to reduce the higher costs of older, more senior employees. *See id.*

The Court of Appeals thus engaged in exactly the weighing of evidence and the assessment of its credibility that this Court expressly forbade in *Reeves*. Weighing the proffered reasons and assessing their credibility are exactly the types of questions reserved for the finder of fact. The court made no citation to the record to support its own invented explanation that the remarks about saving NYRA for younger employees was related to the higher costs of keeping senior employees. There was no indication that any evidence was put forth by NYRA that such a meaning could be attributed to these remarks.

The court attempted to harmonize its holding with *Reeves* by explaining that, in its view, all *Reeves* did was confirm the view that Rules 50 and 56 mandate a case-by-case analysis of the evidence before submission to the trier of fact. To be sure, *Reeves* does contemplate a very limited role for the court in assessing these claims before they are sent to the jury. However, the Second Circuit's expansive reading of *Reeves* entirely undermines the Court's holding. This Court specifically cautioned that the courts "may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. It is difficult to see the *James* court as engaging in anything other than "credibility determinations" and "weigh[ing] the evidence."

2. *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000)

Schnabel was discharged from the Legal Aid Society of Orange County, New York, in 1997 after just over 3 years employment. *Schnabel*, 232 F.3d at 85-86. Schnabel claimed that his discharge was due to unlawful discrimination in violation of the ADEA. *See id.* On Defendants' Motion for Summary Judgment, the trial court dismissed Schnabel's action. The Second Circuit affirmed, holding that although Schnabel met the *prima facie* case and offered evidence to show that the defendants' asserted reasons for the discharge were pretextual, Schnabel "presented no evidence upon which a reasonable trier of fact could base the conclusion that age was a determinative factor in defendants' decision to fire him." *See id.* at 91. The court examined all of the evidence presented by the parties in reaching its decision, noting of particular import that the same person who made the decision to hire Schnabel also made the decision to fire him, and that the person who replaced Schnabel was the same person Schnabel was hired to replace. *See id.* According to the court, this illustrated how the decision to fire Schnabel was not made in a vacuum. *See id.*

These pieces of evidence, when taken as a whole, led the court to find that as a matter of law no reasonable jury could find that Schnabel was discharged because of his age. *See id.* What the Second Circuit did, once again, is to act as a pre-trial jury and weigh the evidence and its probative value in establishing plaintiff's claim. Once the court found that the *prima facie* elements were met and that evidence of pretext had been introduced, it should only have granted judgment as a matter of law if there was undisputed evidence of a different nondiscriminatory motive or if there was "only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted

independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148. This strict standard from *Reeves* bars the trial court from weighing specific pieces of evidence against each other and making an overall assessment of the evidence, which is precisely what the lower court in Schnabel did.[6]

These two decisions, issued at the summary judgment stage, are illustrative of the Second Circuit's departure from this Court's ruling last year in *Reeves*. In the case at bar, however, the problem is exacerbated by the Circuit's imposition of the summary judgment standard at the 12(b)(6) stage – by first imposing a heightened pleading standard and then evaluating the facts pled in the Complaint as if the facts were evidence adduced during discovery.

IV. CONCLUSION

The federal courts disavowed the archaic system of fact pleading in 1938. No longer are federal court plaintiffs required to assert the factual basis for the claims in their complaints except in the narrow category of actions sounding in fraud. The Second Circuit has attempted to add

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[6] For examples of other Courts of Appeals improperly evaluating the evidence on summary judgment, see *Malacara v. City of Madison*, 224 F.3d 727 (7th Cir. 2000) and *Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000). The majority evaluated the work history and experience of Malacara in affirming the grant of summary judgment to the defendants. *See Malacara*, 224 F.3d at 730. The dissent argued that the majority improperly accepted the defendant's version of the facts, *id. at 731*, and noted, "[r]arely have I seen a set of facts so clearly pointing to the need for resolution before a trier of fact." *Id.* at 735. In *Williams*, the First Circuit weighed the probative value of a supervisor's remarks about changing Raytheon's "old, white men" culture against the probative value of Raytheon's stated reason for the discharge in finding that there existed no question of fact for a jury to decide. *Williams*, 220 F.3d at 19-20.

employment discrimination cases to this narrow category by affirming the dismissal of Swierkiewicz' claim for failing to allege facts in his complaint to satisfy its erroneous view of the summary judgment evidentiary standard set forth in *Reeves*. Application of a heightened pleading standard to civil rights complaints is not only contrary to the Federal Rules and Supreme Court precedent, but it is also especially pernicious. Given their acute need for formal discovery, a heightened pleading requirement could effectively bar civil rights plaintiffs from court. The Second Circuit's decision in *Swierkiewicz* is contrary to settled law and must be reversed.

Respectfully submitted,

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November 16, 2001

MOTION FILED

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No. 00-1853

IN THE
Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA, N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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23 pp

MOTION OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") moves this Court pursuant to Supreme Court Rule 37.1(b) for leave to file an *amicus curiae* brief in support of the petitioner in this action. Consent has been sought from both parties for the filing of this brief, and petitioner's counsel has consented. Respondent's counsel has not replied to telephone requests and letters seeking consent for the filing of this brief.

Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established under the laws of the State of New York. It was formed to assist African Americans in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and particularly discrimination in employment.

LDF attorneys have had substantial experience in private enforcement of claims arising under Title VII of the Civil Rights Act of 1964. LDF believes that its experience in, and knowledge gained from, such litigation will assist the Court in this case.

WHEREFORE, for the foregoing reasons, LDF prays that this Court will allow the filing of its brief as *amicus curiae* in this action in support of petitioner.

Respectfully submitted,

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and particularly discrimination in employment. LDF believes that its experience in, and knowledge gained from, such litigation will assist the Court in this case.

Summary of Argument

The Second Circuit's heightened pleading rule in this case fails to consider the many practical and legal restrictions upon informal pre-complaint discovery in employment discrimination cases. These restrictions include federal and state laws prohibiting a prospective plaintiff's access to personnel files and related records as well as widespread employer practices treating many personnel matters as confidential. These matters include documents providing salary information, performance evaluations, employee resumes, job descriptions, promotion criteria and management guidebooks, among others. These materials would need to be available in order for a plaintiff to satisfy the burden that the Second Circuit has imposed in this case.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

These restrictions also include state ethical rules which, in many jurisdictions, place limits on the ability of a prospective plaintiff's counsel to interview decision-makers and potential witnesses employed by corporate defendants. These ethical rules restrict contacts by plaintiff's counsel (and plaintiffs acting at the direction of their counsel) when an employer is represented by an attorney. Some jurisdictions have interpreted their "no-contact" rules broadly to forbid access to virtually any potential witness in an employment discrimination case.

As a consequence of these restrictions, in many instances employment discrimination plaintiffs and their counsel have little information prior to filing the complaint over and above that sufficient to put the defendant on notice of the claims pursuant to the standards of *Conley v. Gibson*, 355 U.S. 41 (1957) and its progeny. Adoption of the Second Circuit's fact-pleading rule would effectively foreclose recourse to the courts to those plaintiffs who lack access, prior to formal discovery, to the documents that show comparative treatment of other employees, and to the witnesses who were decision-makers or otherwise had knowledge regarding the treatment of comparable employees.

ARGUMENT

IN LIGHT OF BARRIERS TO PRE-COMPLAINT DISCOVERY IN EMPLOYMENT DISCRIMINATION CASES, ADOPTION OF THE SECOND CIRCUIT'S FACT-PLEADING RULE WOULD FORECLOSE ACCESS TO THE COURTS FOR REDRESS OF MERITORIOUS CLAIMS

The Second Circuit's decision in this case requires the plaintiff in an employment discrimination case[2] to plead "facts upon which a court could find a violation of the Civil Rights Acts." *Swierkiewicz v. Sorema, N.A.*, 2001 WL 246077 at *1 (2d Cir. March 12, 2001) (No. 00-9010). In order to survive a motion to dismiss, the Second Circuit requires that a plaintiff plead facts in support of each of the *McDonnell-Douglas* elements of a *prima facie* case. This pleading requirement includes facts regarding "qualification for the job in question" and "the circumstances giving rise to an inference" of discrimination. *Swierkiewicz*, 2001 WL 246077 at *2.

The Second Circuit's decision ignores the practical difficulties such a test would impose upon plaintiffs and their counsel in employment discrimination cases, and if affirmed, would effectively foreclose the filing of numerous meritorious claims. The Second Circuit failed to recognize that in many instances prior to formal discovery, a plaintiff does not know many of the central facts of the case. This is because these central facts often require comparison of plaintiff's treatment to that of similarly situated members of the non-protected class. *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff' . . .

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[2] The plaintiff in this case alleged both national origin and age discrimination.

[citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)]. In other words, is 'the employer . . . treating "some people less favorably than others because of their race, color, religion, sex, or national origin."' *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), quoting *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977)").[3]

A. Before the Filing of an Employment Discrimination Complaint, Employers Have Virtually Exclusive Control Over Information Necessary to Establish the Elements of a *Prima Facie* Case

At the outset of an employment discrimination case, the employer has essentially exclusive control over all of the relevant information required to establish the elements of a *prima facie* case. As one district court recently observed:

> [U]nlike plaintiffs outside the employment context, all the relevant action takes place in a setting controlled by the employer. While other plaintiffs can conduct an informal investigation to shape their theories — for example, interview the witnesses to the accident, talk to the participants, determine the strategy out of earshot of his opponents — this Plaintiff must stand at the employer's door and seek permission to enter.

Kaveney v. Murphy, 97 F. Supp. 2d 88, 89 (D. Mass. 2000); *see also Frey v. Department of Health & Human Serv.*, 106 F.R.D.

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[3] Even "qualifications for the job in question" may not be known prior to discovery, as qualification is often a relative concept, requiring information regarding an employer's own interpretation or application of its job requirements. *See, e.g., Ford v. Veterinary Centers of America, Inc.*, 2001 U.S. Dist. LEXIS 15914, at *11 (E.D. Pa. September 13, 2001) (No. 00-4604) (while plaintiff acknowledged that she failed to meet 20-25% of the published job qualifications, evidence suggested that the person selected was even less qualified.).

32, 37 (E.D.N.Y. 1985) (discussing "need of the adverse attorney for information which may be in the exclusive possession of the [organization] and may be too expensive or impractical to collect through formal discovery") (*quoting Wright By Wright v. Group Health Hosp.*, 691 P.2d 564, 568 (Wash. 1984)).

In many situations, facts central to plaintiff's claims are contained within the personnel files of the employer — under the employer's control and unavailable to the plaintiff prior to formal discovery. *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (noting that personnel files "could be central to the plaintiffs' effort to prove pretext," and may be in the "exclusive control of the opposing party"); *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) (acknowledging that personnel file materials reflecting qualifications and job performance are frequently "at the heart of [the] controversy").

Frequently, information in personnel files is protected by statutory protections of privacy. *See, e.g.*, 5 U.S.C. § 552a(b)(11) (prohibiting the release of federal employee personnel files under Privacy Act without a court order); TEX. GOV'T CODE ANN. § 552.102 (exempting from Texas Open Government Act information in employee's personnel file); *Kobeck v. Nabisco, Inc.*, 166 Ga. App. 652, 653, 305 S.E.2d 183, 185 (1983) (acknowledging "that an employee's personnel file is generally considered confidential").

Employers routinely treat as confidential most personnel documents that are relevant to discrimination claims. For example, many employers treat salary data as confidential, *see Hamilton v. 1st Source Bank*, 895 F.2d 159, 164 (4th Cir.) ("[N]ormal and prudent American business practice is to discourage sharing information about salaries."), *rev'd en banc*, 928 F.2d 86 (4th Cir. 1990), as well as job descriptions, employee profiles, performance criteria and documents

describing the criteria and process for promotion actions. *EEOC v. Morgan Stanley*, 132 F. Supp. 2d 146, 152 (S.D.N.Y. 2000) (describing defendant's opposition to production of such documents).

Employers also frequently treat as confidential disciplinary records, job analyses, and employment tests, *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 889 (E.D. Wis. 1999) ("To date, the City has refused to produce the testing documents, the promotion documents or any of the IAD [Internal Affairs Department] documents.") as well as manuals describing an employer's human resources practices. *Herrera v. Mobil Oil Co.*, 1990 U.S. Dist. LEXIS 11082, at *5-*6 (W.D. Tex. August 17, 1990) ("Management Guides" regarding career development, salary administration, job descriptions and equal employment opportunity were treated by the company as confidential). Similarly, documents concerning prior complaints of discrimination by other minority employees are frequently treated as confidential. *EEOC v. Morgan Stanley*, 132 F. Supp. 2d at 149-50 (noting employer's opposition to production of such documents in response to two separate EEOC subpoenas).

Employers do not routinely make confidential materials available prior to litigation — in some instances it is unlawful for an employer to do so. 5 U.S.C. § 552a(b)(11); MD. CODE ANN., STATE GOV'T. §10-616(I) (prohibiting release of personnel records of state employees); MISS. CODE ANN. § 25-1-100 (exempting personnel records of state employees from Public Records Act); N.C. GEN. STAT. § 126-22 (same). In these instances, it is only through the discovery process that plaintiff is able to obtain the relevant facts. *Weahkee v. Norton*, 621 F. 2d at 1082 (noting that FED. R. CIV. P. 37 provides vehicle for obtaining release of personnel files of comparable employees).

On occasion, employers even resist production of such materials in response to EEOC subpoenas issued prior to the start of litigation.[4] *See, e.g., EEOC v. Morgan Stanley*, 132 F. Supp. 2d at 150. In those instances where an employer produces documents to the EEOC, restrictions apply to plaintiff's access to those documents. *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1258-59 (E.D. Wis. 1996) (certain provisions of FOIA "regulate severely the disclosure of information and documentation which the EEOC would receive via this subpoena"); *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 894 (E.D. Wis. 1999) (noting that confidential commercial information, law enforcement materials, testing papers and "promotion documents" were probably unavailable to plaintiff or plaintiff's counsel through a FOIA request filed prior to initiation of Title VII complaint).

As a practical matter, therefore, access to a vast range of documents setting forth facts central to an employment controversy is largely unavailable to employment discrimination plaintiffs and their counsel prior to the filing of the complaint.[5]

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[4] Title VII of the Civil Rights Act of 1964 does not grant to private plaintiffs the subpoena power granted to the EEOC to investigate a claim prior to litigation. 42 U.S.C. § 2000e-9.

[5] Plaintiffs risk losing all rights to recovery under anti-discrimination laws if they pursue informal discovery of confidential documents. *Bonger v. American Water Works*, 789 F. Supp. 1102, 1107 (D. Colo. 1992) (court denied all relief to plaintiff who violated company's confidentiality rules in sharing documents with her counsel in pre-complaint investigation).

B. Ethics Rules Also Place Limits on Plaintiffs' and Their Counsels' Ability to Obtain Specific Facts in Support of a *Prima Facie* Case Prior to Filing a Complaint

Additional barriers restrict employment discrimination plaintiffs' and their counsels' ability to interview witnesses and decision-makers prior to the filing of the complaint. Persons who have made the challenged decision and witnesses to discriminatory conduct frequently remain in the employ of the company. Such persons are often reluctant to become involved in a lawsuit against their employer for fear of adverse consequences.[6] Further, in some jurisdictions, ethical rules restrict access to these witnesses, thereby making it difficult for employment discrimination plaintiffs and their counsel to obtain sufficient factual information before initiating litigation to do more than put their employers on notice of their claims.

Rules of professional conduct against *ex parte* contacts with the employees of a represented corporation have been interpreted by some courts as prohibiting employment discrimination plaintiffs from approaching non-management level employees to obtain evidence relevant to their claims. *See, e.g., Palmer v. Pioneer Inn Associates, Ltd.*, 19 F. Supp.

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[6] This Court has observed:

> The danger of witness intimidation is particularly acute with respect to current employees — whether rank and file, supervisory, or managerial — over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 240 (1978).

2d 1157, 1168 (D. Nev. 1998) (by communicating with employee "capable of making an admission imputable to [employer]," plaintiff's counsel violated Nevada ethics rule forbidding *ex parte* contacts), *app. pending*, *see* 257 F.3d 999, 1003 (9th Cir. 2001) (certifying to Nevada Supreme Court question whether Nevada applies ethical provision barring *ex parte* contact with an employee "whose statement may constitute an admission on the part of the organization."); *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1121 (8th Cir. 1997) (contact with employer's managerial employee was improper, even though employee did not directly supervise plaintiff); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 913 F. Supp. 1306, 1321 (N.D. Iowa 1996) (precluding *ex parte* contacts under Iowa law with shipping department supervisor with authority over seven employees); *Insituform of North America, Inc. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622, 625 (S.D. Ohio 1991) (*ex parte* contact with employee whose "admissions are admissible against the employer" prohibited under Ohio law); *Stanford v. President and Fellows of Harvard College*, 2000 Mass. Super. LEXIS 489 (Super. Ct. Mass. Nov. 1, 2000) (lawyers forbidden under Massachusetts law from speaking with any institutional employee, absent consent of institution's counsel, whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organization), *app. pending*, No. SJC-08592 (Sup. Jud. Ct. Mass.)[7]; *but see Brown v. Oregon Dep't of Corrections*, 173 F.R.D. 265, 268 (D. Or. 1997) (plaintiff's attorney may, under Oregon ethical rules, interview prison employees who observed instances of hostile work environment without agency

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[7] The trial court imposed sanctions of $94,718.80 in attorney's fees for plaintiff's counsel's pre-litigation investigatory efforts that the trial court found to have violated the Massachusetts contacts rule. *See Stanford v. President and Fellows of Harvard College*, Superior Court Civil Action No. 99-4042 (Super. Ct. Mass. March 21, 2001).

counsel's knowledge or consent); *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 903-04 (E.D. Pa. 1995) (permitting *ex parte* contacts, under Pennsylvania ethical rules, with those employees of police department who did not have managerial responsibility).[8] Thus, a requirement that an employment discrimination complaint must plead specific facts showing that at trial a *prima facie* case can be established would not only be contrary to the notice pleading requirements of the Federal Rules of Civil Procedure and this Court's prior decisions,[9] but as a practical matter would — depending on the jurisdiction — not be feasible in light of ethical rules preventing the acquisition of needed evidence.

C. The Second Circuit's Fact-Pleading Rule Conflicts with or Is Unnecessary in Light of Other Provisions of the Federal Rules of Civil Procedure

Adoption of the Second Circuit's fact-pleading rule also raises issues under Rule 11 of the Federal Rules of Civil Procedure. Rule 11(b)(3) requires counsel to certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." It is virtually impossible for an employment discrimination plaintiff to allege facts with specificity and meet this Rule 11 standard.

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[8] The ethics rules implicated are Rule 4.2 of the ABA Model Rules of Professional Conduct and Disciplinary Rule 7-104 of the ABA Model Code of Professional Responsibility, one or the other of which serves as the basis of each state's "contacts" rules.

[9] *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Conley v. Gibson*, 355 U.S. 41 (1957).

Some courts have ruled that Rule 11 requires more than reliance upon the "uncorroborated word" of the plaintiff and plaintiff's witnesses for "the key contentions of the case." *Gartenbaum v. Beth Israel Medical Center*, 26 F. Supp. 2d 645, 647 (S.D.N.Y. 1998) (*quoting Forbes v. Merrill Lynch, Fenner & Smith, Inc.*, 179 F.R.D. 107, 109 (S.D.N.Y. 1998). *vacated sub nom. Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir. 1999)). Again, under the Second Circuit's heightened pleading requirement, this becomes a virtually impossible standard for plaintiff's counsel to meet, particularly in those jurisdictions that impose broad limits on access to witnesses under state ethical rules.

In many instances, there are no sources of information available to plaintiff's counsel prior to filing the complaint other than plaintiff and, depending upon the jurisdiction, perhaps some witnesses. Adoption of the Second Circuit's fact-pleading rule in conjunction with both the barriers to obtaining pre-complaint information described above and Rule 11 standards would make it likely that meritorious claims would not be pursued. Such a result is contrary to the purposes of the Federal Rules of Civil Procedure — "to secure the just, speedy, and inexpensive determination of every action." Rule 1, FED. R. CIV. P. The foreclosure altogether of access to the courts because of a heightened pleading rule is not, of course, a just resolution of a dispute.

Rejection of the Second Circuit's rule does not mean that federal courts must allow non-meritorious claims to go to trial. Rule 56, FED. R. CIV. P. remains the proper vehicle to grant judgment without trial in those instances where there are no genuine issues of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' Fed. Rule Civ. Proc. 56(e)."") (emphasis in original);

Mullin v. Raytheon Co., 164 F.3d 696, 698 (1st Cir. 1999) ("Summary judgment is a device that 'has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways.'"(quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991)).

Nor does rejection of the Second Circuit's rule in this case mean that plaintiffs and their counsel are free to pursue non-meritorious claims once discovery has demonstrated the absence of factual support. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."); *Brown v. Federation of State Medical Boards of the United States*, 830 F.2d 1429, 1436 (7th Cir. 1987) (awarding fees under Rule 11 for counsel's pursuit of case after "the record demonstrated that [plaintiff's] claims were not supported by the facts."), *abrogated by Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989).

CONCLUSION

Significant restrictions, both legal and practical, limit the opportunity of plaintiffs and their counsel to conduct an investigation prior to filing a complaint sufficient to develop the specific facts required to satisfy the Second Circuit's heightened pleading requirements. Adoption of the Second Circuit's rule, in the context of these restrictions, would effectively restrict the ability of plaintiffs with meritorious claims — those dependent upon formal discovery to develop the specific facts in support of a *prima facie* case — to bring their claims at all, thereby effectively denying them recourse to the courts altogether.

Respectfully submitted,

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Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, THE NATIONAL WOMEN'S LAW CENTER, AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

NELA, a voluntary membership organization of more than 3000 attorneys nationwide, is the country's only professional membership organization of lawyers who regularly represent workers in employment, labor, and civil rights disputes. As part of its advocacy efforts, NELA regularly supports litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that those laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 302 (2001).

AARP is a nonprofit membership organization serving more than thirty-five million people age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards employment and retirement. In pursuit of this

---

[1] The position *amici* take has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. Written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

objective, AARP has since 1985 filed more than 200 amicus briefs before this Court and federal appellate and district courts. Nearly 40% of all AARP members—14 million people—are employed. They have strong interests in the outcome of this case, which will affect their rights under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. In addition, because older people have a higher incidence of disabilities than the overall population, significant numbers of AARP members rely on laws based on Title VII, such as Title I of the Americans with Disabilities Act, to address disability-based discrimination in the workplace.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Over the last four decades, the ACLU has appeared before this Court in numerous cases involving the proper interpretation of those civil rights laws, both as direct counsel and as amicus curiae. Additionally, the ACLU has repeatedly opposed a heightened pleading standard in civil rights cases because of the impediment it imposes on civil rights plaintiffs seeking meaningful access to the courts. This case involves the imposition of a heightened pleading standard on a federal complaint alleging employment discrimination based on age and national origin. Its proper resolution is therefore a matter of significant concern to the ACLU and its members throughout the country.

The National Partnership for Women & Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since

its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as amicus curiae in numerous cases involving employment law and civil rights issues.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national nonprofit civil rights organization that has used the power of the law to define and defend women's rights for over thirty years. NOW Legal Defense has appeared before this Court in many employment discrimination cases, including *Faragher v. City of Boca Raton*, 524 U.S. 742 (1998), *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). NOW Legal Defense is particularly concerned that the heightened pleading standard required by the court of appeals below will frustrate plaintiffs' meaningful access to the federal courts in future employment discrimination cases.

SUMMARY OF ARGUMENT

The Second Circuit's decision squares neither with the plain terms of the Federal Rules of Civil Procedure, nor with the spirit of substantial justice that animates them. The Federal Rules decreed a clean break with code pleading in favor of notice pleading, epitomized by Rule 8(a)(2) and reflected in other provisions in the Federal Rules. This Court's interpretation of Rule 12(b)(6) in *Conley v. Gibson*, 355 U.S. 41 (1957), backed by virtually every Court of Appeals, mandates simplicity in pleading employment discrimination cases. The heightened pleading requirement suggested by the Second Circuit in Title VII and ADEA cases is unnecessary and inequitable: employers have already viewed the merits through statutorily-mandated EEOC charge processing procedures and they command the key facts. Nor should employees be required to plead particular legal theories (such as pretext) in the complaint because the facts may ultimately lend themselves to alternative theories of proof.

ARGUMENT

Federal Rule of Civil Procedure 84 commends simple form complaints to courts and practitioners, "intended to indicate the simplicity and brevity of statement which the rules contemplate." By way of example, the model complaint for negligence omits reference to the common law elements of proof for that cause of action:

> 1. Allegation of jurisdiction.
>
> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

> 3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.
>
> Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Fed. R. Civ. P., Form 9. Instead of a detailed recitation of causation and the tortfeasor's duty of due care, the model complaint rests on a bare "conclusory" allegation of negligence.

The petitioner, with the brevity exemplified by this form, alleged that respondent Sorema N.A. fired him on account of national origin and age, in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). This Court must decide whether the petitioner's claim should have expired solely owing to the terseness of his complaint.

The framers of the Federal Rules elected substantial justice and the litigation of merits over the fusty formalism of code pleading. The Rules, departing from pre-existing practice, no longer force pleadings to carry the entire weight of stating, narrowing and resolving fact issues in a case. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 at 68-69 (2d ed. 1990) (hereinafter "WRIGHT & MILLER"). Instead, the Rules afford parties pre-trial conferences, discovery, summary judgment and (ultimately) trials to winnow down fact issues. In particular, Federal Rule of Civil Procedure 8(a)(2) commands that a "pleading . . .

shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

Yet the appellate court's decision below retreats to the era of code pleading, demanding that an employment discrimination plaintiff plead both facts and a legal theory before the privilege of litigating. The court specified that a plaintiff must allege facts establishing a *prima facie* case under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*"). *McDonnell Douglas*, however, set out a framework for what must be proved at trial. The Court of Appeals' extension of *McDonnell Douglas* is so at odds with the framework of the Federal Rules, and this Court's definitive holdings in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), that it cannot stand. *Amici* request that the Court reverse the decision below and remand for further proceedings.

I. THE FEDERAL RULES DISFAVOR COURT-IMPOSED, HEIGHTENED PLEADING REQUIREMENTS

A. The Federal Rules Decisively Rejected Code Pleading in Favor of Notice Pleading

A reexamination of the requirement of "fact" pleading was an important aspect of federal courts' procedural reforms during the 1930s and 1940s that led to the current Federal Rules of Civil Procedure. Professor Richard L. Marcus summarized the background law as thus:

> Common law pleading, which was originally oral, evolved over centuries into an increasingly detailed written exercise. During the same period, the forms of action were developing, and their limitations reinforced pleading difficulties. In order to prevail, the common law plaintiff had to choose the correct form of action. He and his lawyer then embarked on an exchange of pleadings with the defendant that was designed ultimately to produce a single issue for resolution by a judge or trial by jury, with trial itself as something of an afterthought to the pleading process.

Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986) (footnotes omitted). The framers of the Federal Rules, most notably Dean (later Second Circuit Judge) Charles Clark, advocated a procedural order privileging discovery and trial on the merits over pleading practice. *See, e.g.*, Charles Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 318-19 (1938) ("in the case of a real dispute, there is no substitute anywhere for a trial").

This Court celebrated the departure from pre-Rules practice:

> Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device,

> along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.

Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (footnotes omitted).

The centerpiece of this reform was Rule 8(a)(2) which states that "[a] pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." 5 WRIGHT & MILLER, *supra*, § 1202 at 68 ("Rule 8 is the keystone of the system of pleading embodied in the federal rules"); Judge Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (describing Rule 8 as the "jewel in the crown of the Federal Rules").

This Court's preeminent interpretation of Rule 8(a)(2) remains *Conley v. Gibson*, 355 U.S. 41 (1957). African-American railway workers alleged that their union breached its duty of fair representation under the Railway Labor Act when it allowed them to be replaced or demoted in favor of white employees. *Conley* rejected the union's argument that the complaint lacked sufficient detail to support the general allegations of discrimination:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms ap-

> pended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. [*Id.* at 47-48, footnote omitted.]

This Court continues to hold that under this rule, a party has "no duty to set out all of the relevant facts in his complaint." *Atchison Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 n.15 (1987).

This Court has also rejected judicial ingenuity directed against the notice pleading standard. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), the Court unanimously held that federal courts may not apply a pleading standard "more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure in civil rights cases alleging municipal liability" under section 1983. *Leatherman* noted that "the Federal Rules . . . address in Rule 9(b) the need for greater particularity in pleading certain actions, but do not include . . . any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" *Id.* at 168. The Court noted that regardless of whether heightened pleading standards might be desirable, such a result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* Courts, in sum, must honor Rule 8(a)(2) in substance and not innovate for the sake of docket clearing.

Judge Richard A. Posner in *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995), so affirmed in a civil

rights case where a complaint was dismissed for lack of specificity:

> [*Leatherman*] rejects . . . the imposition of heightened pleading requirements in cases governed by the Federal Rules of Civil Procedure unless required by the rules themselves, which is to say by Rule 9. The Court did leave open the possibility that complaints against defendants who might have a defense of immunity (which municipalities do not . . .) may have to be pleaded with particularity. The immunity is against being sued as well as against having to pay damages and would be undermined if the defendant had to engage in pretrial discovery in order to find out exactly what wrong the plaintiff was charging him with. So Rule 9 may not be exhaustive. But apart from the rule itself and a tiny handful of arguably appropriate judicial supplements to it, a plaintiff in a suit in federal court need not plead facts; he can plead conclusions. . . . The pressure of heavy caseloads in the district courts . . . has placed strains on the Federal Rules of Civil Procedure. Those rules, drafted at a time when the federal courts were less busy, may . . . not have kept up with the growth in federal litigation. Increasingly the rules are bent—Rule 56 to allow cases that formerly would have gone to trial to be disposed of on summary judgment, Rules 8 and 12 to allow cases that formerly would have gotten at least as far as summary judgment to be decided on the pleadings. . . . Most judges are pragmatists, and will allow rules to be bent when the pressure is great. But "bent" does not mean "broken." . . .

> *Leatherman* makes clear that the federal courts are not to interpolate a requirement of fact pleading into the federal rules.

Thus, "'I was turned down for a job because of my race' is all a complaint has to say" to satisfy Rule 8(a)(2) in a Title VII action. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

B. The Cumulative Force of the Federal Rules Advantages Economical Pleading

In addition to Rule 8(a)(2) and Form 9 of Rule 84, both noted above, a walking tour of other sections of the Federal Rules reinforces the mandate of notice pleading.

1. *Rule 7(c)*: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." A companion to Rule 8, this section abolished formal common law challenges to the insufficiency of pleadings. This section advanced the framers' common goal of shifting the litigants' battle from the pleadings to the merits. The framers provided an alternative to such practice in the face of an unclear pleading under Rule 8(b): when the defendant cannot adequately affirm or deny allegations, it "shall so state and this has the effect of a denial." The defendant thus suffers no prejudice at the pleading stage and may conduct discovery to clarify the claim.

Though seldom noted today, Rule 7(c) was a sensation when first adopted. "Whether Rule 7(c) would succeed in its objective was a matter of considerable doubt at the time of the promulgation and adoption of the federal rules . . . . Despite the clarity of this policy, it took a number of years to persuade the bench and bar that Rule 7(c) means what it says, and that demurrers are

not to be entertained in actions in the federal courts." 5 WRIGHT & MILLER, *supra*, § 1196 at 556-58.

2. *Rule 8(e)(1)*: "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Courts interpret this provision, in the context of employment discrimination cases, to require a statement of the basis of discrimination, and no more. *See, e.g., EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 853 (6th Cir. 2001) ("[a]n accusation of discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim"); *Bennett*, 153 F.3d at 518 ("a requirement that complaints contain all of the evidence needed to prevail at trial, or at least all the facts that would have been required under the pre-1938 system of code pleading, would induce plaintiffs to violate Rule 8(e) . . . by larding their complaints with facts and legal theories").

3. *Rule 8(f)*: "All pleadings shall be so construed as to do substantial justice." As a leading treatise notes, "This provision is not simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules." 5 WRIGHT & MILLER, *supra*, § 1286 at 546-48. This Court cited this section in *Conley*, holding that "[f]ollowing the simple guide of Rule 8(f) . . . , we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." *Conley*, 355 U.S. at 48. Courts of appeals also cite this section to construe Title VII, ADEA and related anti-discrimination complaints. *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000); *Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1480-81 (9th Cir. 1997).

4. *Rule 9(b)-(h)*: Rule 9 specifies particular allegations that must be plead with specificity. This Court in *Leatherman* noted that "perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b)." *Leatherman*, 507 U.S. at 168. It held, though, that further exceptions to Rule 8 not already expressed in Rule 8 may only be created through the rulemaking process. *Id.*

5. *Rule 12(e)*: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Here lies the tool that most nearly meets the needs of courts and advocates who find a Title VII or ADEA pleading too obscure to comprehend or answer. *See* Marcus, *supra*, 86 COLUM. L. REV. at 452 ("[p]roviding notice would seem, after all, to be the function of a motion for a more definite statement under Rule 12(e)"). This Court recently so noted in a decision rejecting a heightened burden of proof for "unconstitutional motivation" cases brought against public officials. *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998) (noting that the district court may order a reply to a defendants' answer under Rule 7(a) or a more definite statement of the plaintiff's claim under Rule 12(e)). As the Seventh Circuit noted in an employment case, "the [employer] could have requested a more definite statement under Rule 12(e) if [it] believed that it needed more information about [plaintiff's] allegations." *Scott v. City of Chicago*, 195 F.3d 950, 952 (7th Cir. 1999). Sorema, N.A., did not file such a motion below.

6. *Rule 56*: The complement to judicial restraint on Rule 12(b)(6) motions to dismiss is Rule 56 summary judgment. As this Court noted in *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986):

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Summary judgment takes place only after the parties have had an opportunity for full discovery. *Id.* at 326 (citing Rule 56(f)). And in contrast to the pleading stage, summary judgment contemplates a review of the facts. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) (noting that Rule 8(a), unlike Rule 56, "presumes that general allegations embrace those specific facts that are necessary to support the claim"). An attack on the plaintiff's *prima facie* case in an employment discrimination action may suitably occur, if at all, at the summary judgment stage after a sufficient opportunity for discovery.

C. Rule 12(b)(6) Does Not Allow Dismissal of a Complaint Simply Because It Pleads Discrimination in a Conclusory Fashion

The role of Rule 12(b)(6) in a notice pleading regime found definition in *Conley*. The union defendant argued

that plaintiffs' complaint failed to state a claim. But this Court held that the allegations were sufficient:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit.

Id. at 45-46, footnote omitted. Some two decades later, in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), the Court reaffirmed the restrictive *Conley* standard: "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

Conley initiated a continuous line of authority supporting an uncomplicated standard of pleading and strict enforcement of Rule 12(b)(6).[2] The Court has applied

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[2] *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (plaintiff stated claim of equal protection; complaint that could "fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of

(continued...)

these precepts specifically in the employment discrimination arena. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976), this Court rejected an employer's argument under Title VII that plaintiffs alleging racial discrimination "were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee, Jackson." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1986), another Title VII case, reversed a Rule 12(b)(6) dismissal and reaffirmed that "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." There is no hint in any of this Court's decisions requiring particularized facts in Title VII or ADEA pleadings in order for them to survive a Rule 12(b)(6) motion.

The Courts of Appeals regularly cite to *Conley* to reverse Rule 12(b)(6) dismissals of employment discrimi-

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(...continued)
connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners," that "the Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement"); *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (in Fourth Amendment case, reversing dismissal of complaint where "Petitioners have alleged the establishment of a roadblock crossing both lanes of the highway"); *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976) (reversing dismissal of antitrust complaint; "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly"); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (reversing dismissal of prisoner's religious discrimination complaint).

nation complaints. Most courts hold that plaintiffs need not have alleged particular facts to establish a *prima facie* case. *See, e.g., Weston v. Pennsylvania*, 251 F.3d 420, 428-29 (3d Cir. 2001) (citing *Conley*, court finds that bare allegation of hostile work environment was sufficient to meet Rule 8 pleading requirements and survive dismissal for failure to state a claim); *J.H. Routh Packing Co.*, 246 F.3d at 851 ("The Federal Rules of Civil Procedure provide for a liberal system of notice pleading"); *Sparrow*, 216 F.3d at 1114 ("The grounds for the district court's dismissal of Sparrow's complaint are inconsistent with Rule 8 and *Conley*"); *Bennett*, 153 F.3d at 518 ("[t]o the extent the district court required plaintiff to include in the complaint allegations sufficient (if proved) to prevail at trial, the court imposed a requirement of fact-pleading"); *Yamaguchi*, 109 F.3d at 1480-81 ("these liberal pleading rules only require that the averments of the complaint sufficiently establish a basis for judgment against the defendant"); *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) ("the [*McDonnell Douglas*] prima facie case under this analysis is an evidentiary standard—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination that shifts the burden to defendant to articulate some legitimate, nondiscriminatory reason for its conduct," but "is not a proper measure of whether a complaint fails to state a claim").

The Second Circuit appears to be the outlier, as the present case demonstrates. Recently, in *Gregory v. Daly*, 243 F.3d 687 (2d Cir. 2001), the court reversed dismissal of a Title VII complaint under Rule 12(b)(6). But while citing *Conley*, it reaffirmed that a plaintiff must set forth enough facts in her complaint to set forth a prima facie claim. It held that "a simple declaration that

defendant's conduct violated the ultimate legal standard at issue (e.g., it was 'because of sex' or 'severe or pervasive') does not suffice" to survive a motion to dismiss. *Id.* at 692. The lower court's demand that a plaintiff cite facts in support of each element of *McDonnell Douglas* departs from the settled standard of *Conley* by requiring initial pleading of facts *and* a legal theory.

II. HEIGHTENED PLEADING RULES CANNOT BE JUSTIFIED IN EMPLOYMENT DISCRIMINATION CASES

Pleading requirements are somewhat elastic, and this Court has recognized that trial courts may enjoy a limited discretion to insist that pleadings contain some additional detail in exceptionally complex cases, such as antitrust conspiracies. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 458 U.S. 519, 528 n.17 (1983) (in a Clayton Act conspiracy case, this Court observed that "[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed"). *But see McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 248 (1980) (*Conley* standard "applies with no less force to a Sherman Act claim"). Whatever scale of complexity may apply to civil cases, however, individual disparate treatment cases under Title VII, ADEA or related statutes—important though they may be—are scarcely the toughest. Hence, courts' limited discretion to require more detailed pleading has never been extended to employment discrimination cases, nor should it be.

There is no justification to single out employment discrimination cases for heightened pleading require-

ments. If anything, notice pleading makes especial sense in these cases: employers have already viewed the merits through statutorily-mandated procedures and usually have command of the key facts.[3] Under these circumstances, requiring the plaintiff to produce even more facts at the pleading stage is inequitable. And contrary to the Second Circuit's holding below, a plaintiff should not be obliged to commit to a particular legal theory of discrimination (such as pretext) at the pleading stage.

A. The Employer Already Has Notice of the Claim Through the EEOC Charge

Under Title VII, as a precondition to litigation, a "charge" must be filed with the EEOC by a person aggrieved by an unlawful employment practice. The charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). (Coincidentally, the Court is presently reviewing another case under this section. *Edelman v. Lynchberg College*, 121 S. Ct. 2547 (2001).) The EEOC requires a charge to include a "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. ¶1601.12(a)(3). The ADEA does not precisely mirror the Title VII charge filing requirements, 29 U.S.C. § 626(d), but the EEOC

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[3] As discussed more fully below, these include the complainant's filing of a charge, whose terms define the contours of the claims that later may be brought in federal court; investigation of the charge by EEOC, including presentation of the charge to the employer; and in some instances, conciliation between employer and employee.

nevertheless imposes the same "clear and concise" standard on ADEA charges. 29 C.F.R. ¶1626.8(a)(3).

Thus the employer obtains sufficient, formal notice of the employee's particular claims before litigation begins. *See, e.g., White v. New Hampshire Dept. of Corrections*, 221 F.3d 254, 263 (1st Cir. 2000) ("the administrative charge affords formal notice to the employer and prospective defendant of the charges that have been made against it") (internal quotation omitted); *Cable v. Ivy Tech State College*, 200 F.3d 467, 477 (7th Cir. 1999) ("[a] claim falls within the scope of the EEOC complaint if it is like or reasonably related to the charges in the EEOC complaint and if it reasonably could have developed from the EEOC's investigation of the charges before it") (internal quotation omitted). Indeed, an employee risks waiver of any claims not specifically included in a charge. *See, e.g., Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1224-25 (11th Cir. 2000) (failure to check national origin box on EEOC charge form waived such claim); *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994) (claim not raised in EEOC charges is barred from being raised in district court).

Thus, even before the complaint is filed, an employer is already on notice about the dimensions of the employee's claim and the facts he or she asserts. It is difficult to conceive of any prejudice suffered by an employer that has already viewed the employee's administrative charge if an employee does not also detail those facts in her complaint.

B. In Employment Discrimination Cases, Employers Control the Key Facts

Notice pleading in employment discrimination cases dovetails with the insight that the employer ordinarily controls information critical to a plaintiff's claim. *See, e.g., Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983) (*McDonnell Douglas-Burdine* method of establishing a prima facie case addresses circumstance that "employer enjoys greater access to proof of reasons for its own employment decisions"); *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979) ("the employer has the best access to the reasons that prompted him to fire, reject, discipline or refuse to promote the complainant"). The employer has custody of personnel files; data of the gender, race and age composition of the workforce; comparative information about similarly situated employees and like information—the building blocks of any disparate treatment claim. Demanding that plaintiff step up to the plate through her pleading, without a period of discovery of such information, upends the reforms intended by the Federal Rules.

C. The Decision Below Requires Premature Pleading of Legal Theories

Another holding implicit in the Second Circuit's decision is that plaintiffs in employment discrimination cases must spell out their legal theory (here, the pretext or indirect method), as well as their facts, for defendants in advance. This again misapprehends the role of notice pleading under the Federal Rules. "The courts keep reminding plaintiffs that they don't to have to file long complaints, don't have to plead facts, don't have to plead legal theories." *Kirksey v. R.J. Reynolds Tobacco Co.*, 168

F.3d 1039, 1041 (7th Cir. 1999). *See also Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991) (Rule 8(a)(2) allows "the defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery"); *McCalden v. California Library Assoc.*, 955 F.2d 1214, 1223 (9th Cir. 1990) (plaintiff needn't plead legal theories). The Second Circuit's approach harkens back to the discredited "theory of the pleadings" doctrine, which demanded that there be no departure from a theory as originally plead in a complaint. 5 WRIGHT & MILLER, *supra*, § 1219 at 188-89.

An employment discrimination plaintiff is not, of course, limited to the pretext method of proof ratified by this Court in *McDonnell Douglas*. Since *McDonnell Douglas*, the Court has held consistently that the *McDonnell Douglas* test forms just one model of a prima facie case, not an immutable scheme. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (improper for defendants to argue that *McDonnell Douglas* pattern was the only means whereby the plaintiff could establish a prima facie case because "[o]ur decision in that case . . . did not purport to create an inflexible formulation"); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[t]he method suggested in *McDonnell Douglas* for pursuing [the disparate treatment] inquiry . . . was never intended to be rigid, mechanized, or ritualistic"). Other methods sanctioned by this Court include disparate impact (*Watson v. Fort Worth Bank & Trust Co.*, 478 U.S. 977 (1988)), the so-called direct evidence method (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)) and pattern-or-practice (*Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)).

The plaintiff should not be obliged to commit herself to any one theory at the pleadings stage prior to appropriate discovery.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the United States Court of Appeals for the Second Circuit be reversed.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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IN THE

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties has been filed with the Court. The brief urges this Court to affirm the decision below, and thus supports the position of the Respondent Sorema, N.A.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 350 of the nation's largest private sector corporations, collectively employing over 20 million people

[1] Counsel for *amicus curiae* authored the brief in its entirety. No person or entity, other than the *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and other equal employment statutes and regulations. Collectively, EEAC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII, the ADEA and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. As employers, and as potential defendants to claims asserted under these laws, EEAC's members have a substantial interest in the issue presented in this case–*i.e.*, whether a complaint of national origin and age discrimination filed in federal court that does not contain enough facts to support the claim should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6).

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that the parties have

not raised. Because of its experience in these matters, EEAC is well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Sorema, N.A. (Sorema) is a reinsurance company. Joint Appendix (J.A.) 24a. Sorema hired Petitioner Akos Swierkiewicz in April, 1989 as Senior Vice President and Chief Underwriting Officer. *Id.* Swierkiewicz was born on July 25, 1946, *id.*, and was 43 years old at the time. *Id.* at 47a. His national origin is Hungarian. *Id.* at 24a.

In his amended complaint, Swierkiewicz states that approximately six years later, Francois Chavel, Sorema's President and Chief Executive Officer, shifted his job responsibilities from underwriting to marketing and assigned some underwriting duties to Nicholas Papadopoulo, a French national who was 32 years old at the time. *Id.* at 25a. Swierkiewicz alleges in his amended complaint that Mr. Chavel said that he wanted to "energize" the underwriting department when he made this change. *Id.* Although he characterizes the shift in duties as a "demotion," Swierkiewicz does not contend that it resulted in a change in his title or salary. *Id.* at 25a-26a.

According to the amended complaint, two years after the change in job duties had occurred, Swierkiewicz wrote a letter to Mr. Chavel in which he complained about his work environment. Swierkiewicz declared that he was going to leave the company, but only if he received a severance package of one year of paid leave, including all benefits. *Id.* at 34a-36a. Nowhere in the letter did Swierkiewicz mention his age or national origin or contend that his work environment was discriminatory. *Id.*

Two weeks later, Sorema informed Swierkiewicz that he could resign without a severance package or be terminated.

Swierkiewicz refused to resign and was therefore terminated on April 28, 1997. *Id.* at 27a. He claims that Sorema had "no valid basis to fire [him]" and that his "age and national origin were motivating factors in Sorema's decision to terminate his employment." *Id.* Swierkiewicz also alleges that Sorema provided generous severance packages to several other former employees, but did not indicate anyone else's national origin or age, or claim that they were similarly situated to him. *Id.*

The U.S. District Court for the Southern District of New York orally granted defendant's motion to dismiss the amended complaint. Counsel had agreed that the only allegedly adverse employment action at issue in the lawsuit was the April, 1997 termination. The district court ruled that Swierkiewicz's conclusory allegations that his discharge was the result of discrimination based on his age or national origin were "insufficient as a matter of law to raise an inference of discrimination." *Id.* at 40a.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the decision. It agreed that Swierkiewicz's contention that his termination was motivated by national origin discrimination based simply on the fact that he is Hungarian and others at Sorema are French was insufficient as a matter of law to support an inference of discrimination. *Id.* at 48a. Likewise, the court concluded the comment that Sorema's president allegedly had made two years earlier about energizing the underwriting department was not enough to support a finding of age discrimination as a matter of law. *Id.* at 49a.

Swierkiewicz filed a petition with this Court for a writ of certiorari on the issue of whether an employment discrimination plaintiff must plead specific facts showing that he can make out a *prima facie* case of discrimination under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792

(1973), or face dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). The Court granted the petition.

SUMMARY OF ARGUMENT

Both the language of the Federal Rules of Civil Procedure and this Court's instruction to give the defendant fair notice of a claim require a pleader to include, at a minimum, enough facts in his complaint to show that he is entitled to recover. Federal Rules 8(a) and 12(b)(6) both require that a complaint recite more than a bare averment of the claim. Fed. R. Civ. P. 8(a) and 12(b)(6). Instead, this Court has held that a complaint must include enough information to give the defendant fair notice of the nature of the claim and its supporting grounds. *Conley v. Gibson*, 355 U.S. 41 (1957). Adequate notice is necessary to enable the defendant to investigate the cause of action effectively and prepare its defense.

Civil rights complaints must satisfy the same pleading standards that apply to other types of federal claims. Courts routinely require complaints that assert rights under other federal laws to contain enough facts to establish the basis for the claim. *See, e.g., Palda v. General Dynamics Corp.*, 47 F.3d 872 (7th Cir. 1995); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994). In considering a motion to dismiss, courts must grant all reasonable inferences in favor of the plaintiff. Courts should not assume, however, that plaintiffs can prove essential facts or allegations that they have not raised in their complaints. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Requiring that a complaint include sufficient facts to support the claim is not burdensome. Moreover, a discrimination plaintiff typically has more information available to him before filing his complaint to meet this standard than individuals seeking relief under other federal laws.

Holding complaints to a lesser standard than the Second Circuit used would severely prejudice employers by forcing them to defend against frivolous discrimination lawsuits. Under the low threshold Swierkiewicz urges this Court to adopt, any plaintiff could file a bare statement that he or she was subject to discrimination and then use discovery as a fishing expedition to search for evidence of discrimination, even if there were no factual basis to support such a claim. Forcing employers to respond to discovery requests and engage in subsequent motions practice in unfounded suits would severely prejudice them by tying up valuable resources.

ARGUMENT

I. THE LANGUAGE OF THE FEDERAL RULES OF CIVIL PROCEDURE, TOGETHER WITH THIS COURT'S INSTRUCTION TO GIVE THE DEFENDANT FAIR NOTICE OF A CLAIM, REQUIRE A PLEADER TO INCLUDE, AT A MINIMUM, ENOUGH FACTS IN HIS COMPLAINT TO SHOW THAT HE IS ENTITLED TO RECOVER ON HIS CLAIM

A. Federal Rules of Civil Procedure 8(a) and 12(b)(6) Require That a Complaint Contain Enough Factual Information To Show the Pleader Is Entitled to Relief

Two provisions of the Federal Rules of Civil Procedure work together to establish the baseline standard for the contents of a complaint in federal court. Rule 8 is a general rule of pleading that applies to all claims for relief in all civil cases. Fed. R. Civ. P. 8(a).[2] It requires that a complaint contain (1) a short and plain statement of the grounds supporting the court's jurisdiction over the claim; and (2) a

[2] The only exception is for claims alleging fraud or mistake, which must be stated with particularity. *See* Fed. R. Civ. P. 9.

"a short and plain statement of the claim *showing that the pleader is entitled to relief*." Fed. R. Civ. P. 8(a) (emphasis added). Rule 12(b)(6) allows the court to dismiss a complaint that "fail[s] to state a claim *upon which relief can be granted*." Fed. R. Civ. P. 12(b)(6) (emphasis added).

The language in Rules 8(a) and 12(b)(6) is prescriptive. It does not merely require a plaintiff to state a claim, such as a blanket statement that Swierkiewicz's termination was based on his age and national origin. J.A. 27a. Instead, the Federal Rules require that a complaint contain enough essential facts to show that the plaintiff can prevail on his claim. The failure of Swierkiewicz's complaint to include this additional information thus warrants its dismissal.

B. A Complaint Is Insufficient if It Fails To Provide Fair Notice of a Claim and Its Basis

1. This Court has interpreted the Federal Rules to require that a complaint give the defendant fair notice of the claim and its supporting grounds

While not requiring a claimant to "set out in detail the facts upon which he bases his claim," this Court nevertheless held in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), that the complaint must contain "'a short and plain statement of the claim' that . . . give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (footnote omitted). In that case, the petitioners alleged in their complaint that the railroad wrongfully discharged them and that the union failed to protect their jobs, unlike those held by non-minorities. This Court held that the complaint contained enough specific facts to support its general allegations of discrimination to withstand dismissal. *Id.*

In determining whether the allegations were enough to show that defendant had violated the law, the Court announced the rule that: "a complaint should not be dismissed

for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46 (footnote omitted). If the plaintiffs could prove their factual allegations were true, they would show the union had breached its duty to represent members of the bargaining unit fairly and without discrimination.

The Court revisited the requirements of Rule 8(a) in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), to resolve a conflict among the courts of appeals over whether courts could require a "heightened pleading standard" in civil rights cases against municipalities for alleged acts of local officials under 42 U.S.C. § 1983. Some courts had been requiring that this type of complaint set forth more facts in support of the claim than for pleading other causes of action. The Court rejected a higher standard as inconsistent with what it described as "the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. Quoting *Conley*, the Court reiterated that the complaint only had to include enough information to give defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (internal quotations omitted).

The Court's observation in *Conley* and *Leatherman* that a plaintiff need not set forth the facts supporting his claim *in detail*, however, does not give a plaintiff license essentially to provide *no* facts to support his claim. A leading treatise on civil procedure explains: "Implicit in this passage [from *Conley v. Gibson*] is the notion that the rules do contemplate a statement of circumstances, occurrences, and events in support of the claim being presented . . . Rule 8(a)(2) does require that the pleader disclose adequate information concerning the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 5 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1215 (2d ed. 1990 & Supp. 2001)

(footnote omitted). "[M]inimal requirements are not tantamount to nonexistent requirements. The threshold [for stating a claim] may be low, but it is real—and it is the plaintiff's burden to take the step which brings his case safely into the next phase of the litigation." *Gooley v. Mobil Oil Corp.* 851 F.2d 513, 514 (1st Cir. 1988).[3]

Opponents of this standard conveniently, but erroneously, characterize it as a return to "fact pleading." This label allows them to set up a straw figure to attack, since the modern Federal Rules of Civil Procedure embrace the concept of notice pleading and reject fact pleading. This argument, however, misses its mark, since requiring a complaint to contain essential facts to support a claim is not equivalent to instituting fact pleading. Instead, this information is necessary to put a defendant on notice of the plaintiff's claim and its basis, which is exactly what this Court mandated in *Conley* and is consistent with the Federal Rules. *See* 355 U.S. at 47; Fed. R. Civ. P. 8(a) and 12(b)(6).

2. Notice of a claim is not sufficient when the complaint merely states general conclusory allegations

Conclusory allegations that a plaintiff has experienced discrimination are not sufficient to give the defendant notice of the claim and its basis. The First Circuit, for example,

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[3] This Court's pronouncement in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), that "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," does not detract in any way from requiring that a plaintiff plead enough facts in the complaint to show he is entitled to relief. Likewise, the Court's ruling two years later in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 n.11 (1976), that plaintiffs alleging racial discrimination did not have to "plead with 'particularity' the degree of similarity" between plaintiffs and their co-workers to establish a Title VII claim does not extinguish the responsibility to plead enough factual allegations to support a case.

refused to allow "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation" to state a claim for relief in *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). In that case, a former employee alleged he had a constitutionally protected property interest in continued employment and was fired in violation of the First Amendment because of his association with a former judge who held political views at odds with the defendants. In affirming the dismissal of the plaintiff's complaint, the First Circuit emphasized:

> [m]erely juxtaposing a protected characteristic—someone else's politics—with the fact that plaintiff was treated unfairly is not enough to state a constitutional claim . . . What is needed is a fact-specific showing that a causal connection exists linking defendants' conduct, as manifested in the adverse employment decision, to plaintiff's politics, that is, the plaintiff must have pled facts adequate to raise a plausible inference that he was subjected to discrimination based on his political affiliation or views.

Id. at 58.

The First Circuit also dismissed a racial discrimination complaint in *Judge v. City of Lowell*, 160 F.3d 67 (1st Cir. 1998), that lacked any specific factual allegations to support a reasonable inference that racial bias, as opposed to some other non-discriminatory reason, motivated defendants' actions. Plaintiff's conclusory allegations that city officials had failed to notify her of her brother's death or to conduct a proper autopsy and homicide investigation because of her race were not enough to support her claim. Even taken as true, the court held that these errors did not "necessarily imply racial animus, and the mere conclusory allegation of such will not suffice." *Id.* at 77. Moreover, the court held that any rude and unprofessional conduct city officials may have exhibited towards plaintiff did not "creat[e] a reasonable

> inference that Judge's race—as opposed to other factors—was a motivating factor in defendants' alleged responses . . . [O]therwise, any unsatisfactory dealings between a public official and . . . [a person] falling into a protected category would give rise, prima facie, to a potential equal protection claim." *Id.*

The Seventh Circuit similarly dismissed a First Amendment retaliation complaint in *Kyle v. Morton High School*, 144 F.3d 448 (7th Cir. 1998), for failing to include enough facts to give defendant notice of the claim. The court held that "[f]or fair notice to be given, a complaint must at least include the *operative facts* upon which a plaintiff bases his claim." *Id.* at 455 (internal quotations and citations omitted) (emphasis added). This test asks whether "sufficient facts [have been] pleaded to allow the district court to understand the gravaman of the plaintiff's complaint." *Id.* (internal quotations and citation omitted). In *Kyle*, the plaintiff merely alleged that he was fired because of "'political and advocacy' reasons" without stating that he engaged in any protected speech or conduct for which his employer allegedly fired him. *Id.* at 454.

Likewise, Swierkiewicz's mere allegation that he was fired because of his national origin or age does not provide enough factual basis to give Sorema fair notice of the claim and its grounds. The Second Circuit thus properly dismissed his complaint.

3. Fair notice is necessary to enable the defendant to investigate and respond effectively to the cause of action

Allowing a complaint that merely alleges that the plaintiff was fired because of unlawful discrimination frustrates an employer's ability to investigate adequately and effectively address potential discrimination in the workplace. *See Kyle v. Morton High Sch.*, 144 F.3d at 455. If an employer does not

have enough information from the complaint to determine the basis for the claim, then it will not be able to identify relevant documentary evidence or witness testimony to review in order to evaluate the plaintiff's claim and promptly initiate remedial measures, if necessary.

This concern also arises in the context of the administrative investigation of discrimination complaints. Before an individual is entitled to institute a lawsuit, both Title VII, 42 U.S.C. § 2000e *et seq.*, and the ADEA, 29 U.S.C. § 621 *et seq.*, require him to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the allegedly discriminatory event, or three hundred days if a state or local enforcement agency exists with authority to grant or seek relief. 42 U.S.C. § 2000e-5(e). Title VII requires the EEOC to serve a "notice of the charge" upon a respondent employer that indicates the date, place and circumstances of the allegedly discriminatory employment practice. *Id.* The ADEA regulations require a charge to contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the unlawful employment practice." 29 C.F.R. § 1626.8(a)(3).

The failure of a charge to include this information motivated Justice O'Connor to write separately in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 82-95 (1984) (O'Connor, J., concurring in part and dissenting in part).[4] In that case, the charge merely alleged in a sweeping and conclusory fashion that Shell had failed to "recruit, hire, promote, train, assign or

[4] Justice O'Connor, joined by the Chief Justice, Justice Powell, and Justice Rehnquist, dissented on the specific factual question of whether the EEOC's notice of charge gave Shell sufficient notice of the alleged discrimination. Her views on the purpose of the EEOC's notice of charge, however, are consistent with that of the majority opinion.

select" African-Americans and females. *Id.* at 89. Justice O'Connor concluded it did not give Shell adequate notice of the alleged discrimination:

> a notice of charge adequately discloses the "date, place and circumstances of the alleged unlawful employment practice" only when it informs the respondent of the complainant's underlying reasons for filing the charge and is sufficient to permit a well-intentioned respondent to undertake immediate remedial measures if the charge is valid.

Id. at 91. Justice O'Connor went on to explain that this standard serves several purposes, including giving the employer fair notice of the allegations against it and increasing the likelihood that the agency investigation would proceed reasonably and fairly. *Id.* at 91-92.

Similarly, requiring that a complaint contain enough facts, beyond the mere allegation that a termination was discriminatory, puts the defendant on notice of the circumstances that support an inference of unlawful bias and promotes discovery targeted to the underlying cause of action. Otherwise, the defendant would not even know enough about the basis for the claim to determine whether a plaintiff's discovery request is overly broad or to draft focused discovery requests itself. Instead, an employer would have to conduct two stages of discovery–first to develop the basis for plaintiff's theory of discrimination and second to refute it. Allowing a conclusory complaint to expand the discovery process in this manner impermissibly broadens its scope, shifts the plaintiff's responsibility to state a claim upon which relief may be granted to the defendant, and thus is fundamentally unfair to defendants.

C. Civil Rights Complaints Should Be Held to the Same Pleading Standard as Other Types of Federal Claims

1. Courts routinely require that complaints for federal claims other than civil rights contain enough facts to establish the basis for the claim

The Supreme Court's ruling in *Leatherman* that civil rights cases do not deserve a higher pleading standard than other types of federal claims does not support imposing a more lenient standard on them either. *See* 507 U.S. at 168. The Second Circuit correctly used the same standard to evaluate the sufficiency of Swierkiewicz's employment discrimination complaint as courts have used to judge other types of federal complaints.

Courts have required that complaints alleging violations of antitrust laws, for example, include enough facts to support each component of a claim in order to withstand a motion to dismiss under Rule 12(b)(6). The Fourth Circuit affirmed the dismissal of a complaint that did not contain sufficient facts addressing all of the required elements of an antitrust claim in *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994). The court held that "[a] mere allegation that 'the defendants violated the antitrust laws as to a particular plaintiff and commodity' is insufficient to survive a Rule 12(b)(6) motion." 14 F.3d at 221 (citation omitted). *See also Aquatherm Indus. v. Florida Power & Light Co.*, 971 F. Supp. 1419, 1424 (M.D. Fla. 1997) ("'plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified.' . . . Conclusory allegations 'will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief . . . .'") (citations omitted), *aff'd*, 145 F.3d 1258 (11th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999).

Using the same rationale, the Seventh Circuit affirmed the dismissal of a breach of contract claim in *Palda v. General Dynamics Corporation*, 47 F.3d 872 (7th Cir. 1995). In that case, the court set forth the necessary elements for plaintiff's breach of contract claim and held that his failure to plead sufficient facts to support one of these elements made his complaint deficient. *Id.* at 874-75. The court concluded that "[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Id.* at 875 (citations omitted).

Requiring that a complaint contain enough facts to support the claim asserted does not mean the complaint must be lengthy or detailed. Form 9 in the Federal Rules of Civil Procedure contains enough facts in three sentences to support the plaintiff's claim for negligence. Fed. R. Civ. P., Appendix of Forms, Form 9. The complaint states that the defendant drove a car against the plaintiff and describes the plaintiff's injury. *Id.* Implicit in the description of the incident is the existence of a duty not to hit pedestrians while driving, a breach of that duty, and injury. Therefore, the complaint contains factual assertions to support each element of a negligence claim.

In contrast, Swierkiewicz's complaint merely alleges that he was terminated from his job and that "no valid basis" existed for his discharge. J.A. 27a. These allegations alone, however, do not reasonably lead to the conclusion that the event was due to discrimination based on his age or national origin. Sorema could have had a number of lawful reasons for firing Swierkiewicz. Or, alternatively, it could have fired Swierkiewicz for no reason without violating either Title VII or the ADEA. In contrast, a defendant driving a car generally will not have a lawful reason for striking a pedestrian crossing the street.

2. Courts should not assume that plaintiffs can prove facts or assertions that they have not alleged in their complaints in ruling on a motion to dismiss

In ruling on a motion to dismiss, courts must construe the complaint in the light most favorable to the plaintiff and draw all *reasonable* inferences from the allegations in his favor. "However, the court will not accept conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990 & Supp. 2001). "[M]ore detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant . . . [I]f the allegations in the complaint, taken as true, do not effectively state a claim, the added assertion by plaintiff that they do state a claim will not save the complaint." *Id.*

This Court cautioned lower courts against engaging in precisely this type of speculation in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). In that case, the Court held that a complaint that failed to allege sufficiently that the defendant's antitrust violations had injured plaintiffs should be dismissed. The Court explained that even if the defendant's conduct had been unlawful, "[i]t is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Id.* at 526 (footnote omitted).

Adhering to this Court's instructions, the Sixth Circuit affirmed the dismissal of a police chief's discrimination complaint in *Jackson v. City of Columbus*, 194 F.3d 737 (6th Cir. 1999). In that case, plaintiff alleged that he was discriminated against based on his race when his employer instructed him not to discuss a pending investigation for

misconduct and barred him from his office and city facilities. While plaintiff alleged that he was treated differently than similarly situated nonprotected employees, the court nevertheless dismissed the action because the complaint did not contain any facts to support this bare allegation. "His statement that to his knowledge no other Columbus official or citizen has ever been subjected to a gag or banishment order is insufficient . . . Plaintiff must allege facts showing that non-minority employees who were similarly situated in all respects were treated differently . . . , not simply that plaintiff's circumstances were unique." *Id.* at 752 (internal quotations omitted).

The First Circuit explained in *Correa-Martinez* that although Rule 12(b)(6) requires courts to accept the allegations in a complaint as true and to draw all reasonable inferences from them, it "does not entitle a plaintiff to rest on 'subjective characterizations' or conclusory descriptions of 'a general scenario which could be dominated by unpleaded facts.'" 903 F.2d at 53 (citation omitted). In other words, "[courts] are not obligated to give free rein to imagination, . . . conjure up unpled allegations or . . . credit every conceivable inference." *Id.* at 58 (internal quotations and citations omitted). Therefore, the Second Circuit properly did not need to assume in this case that the former employees who allegedly received severance packages were similarly situated to Swierkiewicz or had a different national origin or age.

3. Requiring that a complaint include sufficient facts to support the claim is not burdensome

To require a pleader to include enough facts in his complaint to show that he is entitled to relief is not burdensome. Although the Second Circuit refers to the *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), test for establishing a *prima facie* case of discrimination, it did not impose this standard for providing evidence

at trial onto the pleading stage. Requiring that a complaint include essential facts to support a claim is not equivalent to requiring proof that the facts are true at this stage.[5] To survive dismissal, a plaintiff only needs to allege enough facts that, to the best of his knowledge, information and belief, are true to support his entitlement to relief. Rule 11 of the Federal Rules of Civil Procedure, which provides sanctions for, *inter alia*, filing a complaint that lacks evidentiary support, requires only a reasonable inquiry under the circumstances before the plaintiff makes this affirmation. Fed. R. Civ. P. 11(b). But to dispense even with this minimal requirement and allow a pleader to allege merely that his termination was discriminatory, without any facts to support this claim, would render Rule 11 useless.

In this case, the bulk of Swierkiewicz's complaint focuses on a shift in job duties in 1995, not his termination two years later. Swierkiewicz did not file a timely charge with the EEOC over this transfer, however, as Title VII requires before he may file a lawsuit in federal court. 42 U.S.C. § 2000e-5. His lawsuit therefore challenged only his discharge, to which his complaint devoted a scant handful of paragraphs.

4. A discrimination plaintiff typically has enough information available to him before filing his lawsuit to enable him to include essential facts in his complaint to show he is entitled to relief

Petitioner and his *amici* complain that requiring a plaintiff to allege enough facts in his complaint to support his claim

[5] Moreover, this Court described the burden of establishing a *prima facie* case of disparate treatment as "not onerous." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The Second Circuit's standard of requiring that a complaint simply allege enough facts to support a claim of discrimination through direct or circumstantial evidence is similarly undemanding and should be affirmed.

puts an unfair burden on him before discovery, because the employer is in control of the supporting facts. A discrimination plaintiff does not file suit in federal court, however, in a vacuum.

As part of its mandate to enforce Title VII and the ADEA, the EEOC has authority to investigate and conciliate allegations of unlawful conduct. 42 U.S.C. § 2000e-5; *see also* Section I.B.3, *supra* at 12. The agency has a variety of ways to gather information during an investigation, including inspecting the employer's premises, interviewing the charging party, the respondent, and their witnesses, requiring written statements from the parties, and requesting data, including interrogatories, employment records, and other documentary evidence. 29 C.F.R. §§ 1601.15 and 1626.15. The EEOC may issue subpoenas to acquire relevant documents or testimony. 29 C.F.R. §§ 1601.16 and 1626.16.

The regulations explicitly authorize the EEOC to disclose this information to both the complainant and respondent, or their attorneys, "where disclosure is deemed necessary for securing appropriate relief." 29 C.F.R. § 1601.22. Thus, a plaintiff may benefit from discovery the EEOC has conducted into his allegations to prepare his employment discrimination complaint, without even having to pay for it.

In addition, several states have laws giving current and former employees the right to inspect their own personnel files. *See, e.g.*, Conn. Gen. Stat. § 31-128b; Mich. Comp. Laws § 423.503. These files generally contain information used by the employer to make decisions regarding employment, promotion, compensation, termination or disciplinary matters and thus may provide relevant facts to include in a discrimination complaint to support plaintiff's allegations.

Discrimination plaintiffs thus typically have sufficient information available to them from a variety of sources to be able to include in their complaint enough facts that, if proved, would show that defendant acted unlawfully. In fact,

Swierkiewicz had *more* access to relevant information to include in his complaint than most other plaintiffs suing in federal court. His failure to do so thus warrants dismissal of his complaint.

Title VII and the ADEA both allow an individual to file suit in court before the EEOC has completed its investigation under certain circumstances. Under Title VII, an individual may request a right to sue letter from the EEOC 180 days after he filed a charge. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28. The ADEA permits an individual to file a civil action 60 days after filing a discrimination charge with the EEOC. 29 U.S.C. § 626(d). This Court, however, should not reward an individual who declines to participate in the agency's investigation and conciliation efforts by allowing him to bypass a pleading requirement that applies to all federal claims.

III. HOLDING COMPLAINTS TO A LESSER STANDARD THAN THE SECOND CIRCUIT USED WOULD SEVERELY PREJUDICE EMPLOYERS BY ALLOWING INDIVIDUALS TO FILE FRIVOLOUS DISCRIMINATION LAWSUITS THAT SUBJECT DEFENDANTS TO TIME-CONSUMING AND COSTLY LITIGATION

A. Reversing the Second Circuit's Decision Below Would Encourage Complaints That Abuse the Judicial System

Swierkiewicz complains that the dismissal of his complaint deprived him of "the chance to discover Sorema's reason for his employment termination; or why it was abrupt; or who made the decision; or the identity, age and national origin of his replacement; or how Sorema treated other terminated employees." Petitioner's brief, at 22. His contention, however, reflects a fundamental misunderstanding of the purpose

of the judicial system. A lawsuit must be the result of at least a limited investigation into an adverse employment action that reveals some circumstance supporting a reasonable inference of discriminatory bias. *See* Fed. R. Civ. P. 11. It should not be the first step a party takes after experiencing an allegedly adverse action to *determine* whether the action was discriminatory, as Swierkiewicz envisions. Discovery is a privilege conditioned on presenting a sufficient complaint, not an automatic right.

Swierkiewicz's inability to pinpoint a reason for his termination does not mean it must have been—or even probably was—because of unlawful discrimination. His allegation that "Sorema had no valid basis to fire [him]," J.A. at 27a, is irrelevant, since nowhere does he allege that Sorema *needed* a valid reason to fire him. Therefore, the absence of a "valid" reason for his termination does not reasonably support any inference of a discriminatory motive.

Rule 12(b)(6) serves an important function in enabling the judicial branch to monitor lawsuits to ensure that they present legal theories that are grounded both legally and factually. This Court has not been hesitant to dismiss complaints that fail to satisfy this standard in the past. In *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989), it characterized the function of Rule 12(b)(6) as "streamlin[ing] litigation by dispensing with needless discovery and factfinding."

The scenario Swierkiewicz proposes essentially invites employees to file a discrimination lawsuit in federal court every time they experience an employment action they think is unfair. Many of these cases likely will be unfounded, since people would rather believe an adverse employment action is the result of discrimination rather than their own shortcomings. Title VII, however, only gives individuals a cause of action to challenge employment actions they can show were based on a protected characteristic.

In fact, employees often ask courts to review ordinary employment actions that they think are unfair, a role courts consistently have refused. Courts have said repeatedly that their function is not to sit as a "super-personnel" department to reexamine personnel decisions an employer makes during the course of business. *See, e.g., Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1233 (10th Cir. 2000); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 21-22 (1st Cir. 1999); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir.), *cert. denied*, 528 U.S. 818 (1999); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1035 (7th Cir. 1999); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Yet, Swierkiewicz asks the court to undertake precisely this role by filing a complaint full only of conclusory allegations.

B. Forcing Employers To Defend or Settle Complaints That Satisfy a Lower Threshold Than the Second Circuit Used Would Severely Harm Them

Calling litigation today "too expensive a process to waste time on fanciful claims," the Third Circuit recognized the difficulties created by allowing complaints to proceed past dismissal even though they do not plead enough facts to support the claim. *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 182 (3d Cir. 1988). The Seventh Circuit explained this problem in more detail in an antitrust case: "When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984).

The same concerns of subjecting defendants to the time-consuming and costly machinery of federal litigation based solely on conclusory and speculative allegations apply with equal force to employment discrimination cases. Holding complaints to a lesser standard than the Second Circuit used would allow each individual who feels adversely affected by one of the millions of employment decisions that EEAC's member companies routinely make and implement each year to file a discrimination claim based on no more than a conclusory allegation that discrimination motivated the decision. This scenario would force employers to defend against potentially millions of employment discrimination lawsuits each year. While defending against some lawsuits, standing alone, probably would not strain an employer's operations, a number of lawsuits in the aggregate may well have that effect.

Moreover, defending a company against even a simple employment discrimination lawsuit today has become so time-consuming and expensive, with uncertain outcomes, that many employers opt to settle cases instead of litigating them. This decision occurs even if the claims do not have much merit. Setting a standard for discrimination complaints that is lower than the one the Second Circuit used is sure to create a surge in employment discrimination lawsuits that will impact settlements.

Statistics from the federal judicial system show that an overwhelming proportion of plaintiffs do not have enough evidence to support their employment discrimination cases. From October 1, 1999 to September 30, 2000, for example, plaintiffs filed 21,032 employment discrimination cases in federal court. Judicial Business of the United States Courts 2000, Table C-2A (Admin. Office of U.S. Courts, Oct. 1, 1999–Sept. 30, 2000). During the same period, the courts concluded 19,968 cases. *Id.* at Table C-4. Of the terminated

cases, over 60% were cases the courts closed before even holding a pretrial conference. Only 4.8% of the cases that finished during that period even reached trial.[6]

Terminating a case prior to trial usually means the decision was in favor of the defendant. Relaxing the standard for dismissal from the Second Circuit's position thus would increase greatly the number of claims defendants must confront in court. Once they pass the low threshold Swierkiewicz advocates as sufficient to survive dismissal, the sheer volume of plaintiffs' lawsuits essentially will force employers to capitulate to their demands for a quick settlement. Reversing the decision below thus may even jeopardize an employer's entire operations.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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December 2001

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[6] These percentages of employment discrimination cases concluded before trial are consistent with previous years. *See* Judicial Business of the United States Courts 1997-1999, Tables C-4 (Admin. Office of U.S. Courts, Oct. 1, 1996–Sept. 30, 1999).

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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA, N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom ("the Center") is a non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the United States Constitution, including, but not limited to, due process rights, free speech rights, property rights, privacy rights, freedom of association, and religious freedom. Of par-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

ticular importance to the Center in this case is constitutional protection for "individual" due process under the law, whether that individual be a person or corporate entity. The Center believes that reduction of frivolous claims through the conscientious and consistent enforcement of the pleading requirements of the Federal Rules of Civil Procedure is a vital step toward protecting such due process.

SUMMARY OF ARGUMENT

Employment discrimination actions brought under the federal anti-discrimination statutes (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and the Age Discrimination in Employment Act ("ADEA")) are subject to the notice pleading requirements of the Federal Rules of Civil Procedure (the "Rules"). Petitioner's interpretation of "notice pleading," however, fails to give the type of notice contemplated by the Rules or the case law interpreting them. Petitioner argues that a discrimination plaintiff need only aver that "an employee was fired because of his national origin and age . . . to overcome a defense motion to dismiss." (Petitioner's Brief, p. 16.) Such a conclusory allegation fails to provide a defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Rather, it provides the defendant with little, if anything, more than notice that he or she is being sued.

Moreover, should such a conclusory allegation suffice to overcome a defense motion to dismiss, Rule 12(b)(6) is rendered a nullity in the employment context, something this Court has never previously held or even suggested. As a result, Petitioner really is asking this Court to adopt a new, relaxed pleading, indeed a "non-pleading" standard in employment discrimination lawsuits. Nothing about discrimination cases or discrimination plaintiffs warrants such a special exception. Due to the Equal Employment Opportunity Commission ("EEOC") charge filing and investigative processes,

and the rights accorded plaintiffs under the Freedom of Information Act ("FOIA"), discrimination plaintiffs are among the most informed of civil litigants at the pleading stage and are in the best position to plead at least some facts in support of their claims. Likewise, discrimination defendants, having already been through the investigative process, have a compelling due process right to have meritless claims dismissed at the pleading stage.

The Second Circuit did not employ a "heightened" pleading requirement in affirming the district court's grant of Respondent's motion to dismiss Petitioner's discriminatory termination claims. Rather, the Second Circuit required compliance with the Rule 8 mandate to show that the claimant is "entitled to relief." Petitioner failed to do so and his Complaint properly was dismissed.

ARGUMENT

I. PETITIONER'S CONCEPT OF NOTICE PLEADING RENDERS RULE 12(b)(6) A NULLITY AND MISINTERPRETS THIS COURT'S PRIOR RULINGS.

Rule 1 sets forth the "Scope and Purpose of the Rules" and mandates that "[the Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." This broad pronouncement, which provides the backdrop for the construction of the Rules, is applicable to plaintiffs *and* defendants, petitioners *and* respondents, alike. It exemplifies this Court's focus on striking a balance between the fair adjudication of claims and the avoidance of undue cost or delay in doing so.[2] Rules 8 and 12

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[2] *See* Advisory Committee Notes regarding 1993 amendments to Rule 1 ("The purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers

effectuate that balance at the pleading stage of litigation by providing minimum pleading requirements and the method and means to attack deficient pleadings, respectively. Rule 8(a) states, in relevant part:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim *showing that the pleader is entitled to relief*, and (3) a demand for judgment for the relief the pleader seeks. (Emphasis added.)

Rule 12(b) provides, in relevant part, that a party may bring a motion to dismiss for "(6) failure to state *a claim upon which relief can be granted* . . . . A motion making any of these defenses shall be made *before* pleading if a further pleading is permitted." (Emphasis added.)

Petitioner's argument that a plaintiff in the employment discrimination context need not allege *any* facts and yet may still satisfy the pleading requirements of Rule 8(a) renders Rule 12(b)(6) a nullity. Moreover, it is inconsistent with Rule 8(b) and Rule 11 – which also presuppose the pleading of some *factual* allegations.[3]

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of the court, attorneys share this responsibility with the judge to whom the case is assigned.")

[3] Rule 8(b) requires that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial." Rule 11(b)(3) requires attorneys and parties to certify that "the allegations *and other factual contentions* have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." (Emphasis added.) Rule 11(b)(4) requires attorneys and parties to certify that "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information or belief."

A. Basic Statutory Construction Requires That Rules 8(a) And 12(b)(6) Be Read So As To Make Each Enforceable.

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, ___ U.S. ___, 122 S. Ct. 441, 449 (2001) (citations omitted). This Court repeatedly has reaffirmed that "'[i]t is our duty "to give effect, if possible, to every clause and word of a statute."'" *Duncan v. Walker*, 533 U.S. 167, ___, 121 S. Ct. 2120, 2125 (2001) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Indeed, the Court is "'reluctant to treat statutory terms as surplusage' in any setting." *Duncan*, 533 U.S. at ___, 121 S. Ct. at 2125 (citation omitted). The same is true for each of the Federal Rules of Civil Procedure promulgated by this Court. To fulfill the overall purpose of the Rules -- the just, speedy, and inexpensive determination of every action -- each Rule should be read so as to give it full effect.

B. Petitioner's And *Amici*'s Interpretation Of Rule 8 Renders Rule 12(b)(6) A Nullity In The Employment Discrimination Context.

Reduced to its essence, Petitioner and *Amici* argue that Rule 12(b)(6) does not apply to discrimination lawsuits. If a discrimination plaintiff satisfies the pleading requirements of Rule 8(a) simply by alleging that (1) he is in a protected group; and (2) a conclusory allegation that he was subjected to discrimination, it is difficult, if not impossible, to conjure a discrimination complaint that could be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). Should this Court adopt such a relaxed standard – one in which no facts, only conclusory allegations, need be pled to satisfy Rule 8(a) – it is actually holding that Rule 12(b)(6) does not apply to discrimination cases. Such a result is unwarranted.

In order for a Rule 12(b)(6) motion to be granted, the moving party must establish that the plaintiff has failed to state a claim for which relief can be granted. A "claim" is nothing more than the sum of its elements. Thus, a moving party must show that the plaintiff has not alleged one or more elements of the claim (*i.e.*, prongs of the *prima facie* case) and, therefore, did not, as a matter of law, state a claim. The analysis has nothing whatsoever to do with determining whether a plaintiff has evidence to support the allegations in the complaint, weighing the evidence, assessing plaintiff's likelihood of ultimately prevailing at summary judgment or trial, or deciding whether plaintiff has set forth a complete and convincing picture of the alleged wrongdoing. Rather, Rule 12(b)(6) serves as the gatekeeper that determines whether a plaintiff will be allowed to offer evidence in support of his complaint. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.") It is an issue of pleading, not of proof. However, it requires the pleading of at least some facts. Otherwise, there is nothing for a court to examine under Rule 12(b)(6). If a claim could be stated by offering nothing more than "I am in the protected group and I suffered an adverse job action because of discrimination," no court could analyze the complaint to determine whether it states a claim. This Court has not set such a low threshold for pleading. Even in the context of discrimination cases, this Court has held that Rule 12(b)(6) requires that facts, not just conclusory allegations, be pled.

C. Petitioner Misinterprets This Court's Prior Ruling In *Conley* In Arguing That Discrimination Plaintiffs Need Not Plead Facts.

In support of their position, Petitioner and *Amici* improperly rely upon this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), for the proposition that a plaintiff in an em-

ployment discrimination action need not plead facts in support of his or her claim.[4] In making such an argument, Petitioner relies upon quotations from the *Conley* decision – divorced from the factual context in which they were made – and ignores key language in the Court's opinion. Indeed, the *Conley* Court neither mandated that Rule 12(b)(6) was inapplicable in the employment discrimination context nor that a plaintiff need not set forth any facts in support of his or her claim of employment discrimination.

In *Conley*, African-American members of the Brotherhood of Railway and Steamship Clerks brought a class action against the Brotherhood, and its Local Union No. 28, alleging breach of the duty of fair representation of all Union members without regard to race. *Id.* at 42. Defendants moved to dismiss the complaint on a number of grounds, including lack of jurisdiction, failure to join an indispensable party, and failure to state a claim upon which relief could be given. *Id.* at 43. The District Court granted defendants' motion on the ground that Congress had given the Railroad Adjustment Board exclusive jurisdiction over the controversy. *Id.* at 43-44. The Fifth Circuit Court of Appeals affirmed, relying on the same ground. *Id.* at 44. This Court granted *certiorari* and held that it was error for the lower courts to dismiss the complaint for lack of jurisdiction. *Id.* Although the District Court did not rule on the other grounds advanced by defendants in their motion to dismiss, this Court considered and ruled upon their merits. *Id.* at 45.

In adjudicating respondent's argument that the complaint failed to set forth a claim upon which relief could be granted, this Court analyzed the sufficiency of the allegations alleged by petitioners. These factual allegations included the following: (1) "In May 1954, the Railroad purported to abolish 45

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[4] "[A] complaint averring that an employee was fired because of his national origin and age . . . must also be sufficient to overcome a defense motion to dismiss." (Petitioner's Brief, p. 16.)

jobs held by petitioners or other Negroes all of whom were either discharged or demoted"; (2) "In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority"; (3) "Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees"; and (4) "[T]he Union had failed in general to represent Negro employees equally and in good faith" in violation of the Railway Labor Act. *Id.* at 43. The Court held that, if proven, the complaint's allegations would constitute "a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit." *Id.* at 46.

Addressing respondent's argument that the complaint failed to set forth sufficient facts, the Court responded:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out *in detail* the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's *claim is and the grounds upon which it rests*.

Id. at 47 (emphasis added) (footnote omitted). The Court further explained that it had "no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." *Id.* at 48.

The Supreme Court used the *Conley* decision to explain what is and is not required to survive a motion to dismiss under the notice pleading standard adopted by the Federal Rules. Far from holding that a discrimination plaintiff need not plead any facts in support of his claim, *Conley* stated that the "Federal Rules of Civil Procedure do not require a claimant to set out *in detail* the facts upon which he bases his claim. " *Id.* at

47 (emphasis added). In other words, the Court ensured that petitioners had, at a minimum, alleged the requisite facts so as to state a claim for relief should the evidence support them, but it was not going to require petitioners to plead every fact possible in support of their claims at that early stage of the litigation. This balance effectuates Rule 8(f)'s mandate that "[a]ll pleadings shall be so construed as to do substantial justice," especially in light of the numerous factual allegations pled by petitioners in support of their claim. The *Conley* Court did not face, nor did it adjudicate, a scenario in which a plaintiff sets forth *no facts* to support his claim of discrimination. Moreover, the Court gave no indication that a plaintiff would survive a motion to dismiss and be afforded the opportunity to offer evidence in support of his claims in such a scenario.

Petitioner and *Amici* start with the incorrect presumption that notice pleading means that a plaintiff need not allege any facts in support of his claims; it satisfies the pleading requirements to simply put a defendant on notice that he is being sued. They then purport to place the imprimatur of the Supreme Court upon that faulty presumption by citing *Conley* as affirming their position. To do so, they divorce *Conley* from its factual context (particularly that the *Conley* petitioners set forth enough facts to state a *prima facie* case) and ignore the "in detail" portion of the quotation addressing what facts must be alleged. Indeed, the circuit court decisions relied upon by Petitioner for the proposition that a plaintiff can satisfy Rule 8(a) and survive a motion to dismiss without pleading facts in support of his claim (Petitioner's Brief, pp. 18-19), rely on this faulty analysis of the *Conley* decision and/or involve factual allegations sufficient to state the elements of the claims asserted.[5]

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[5] *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114-16 (D.C. Cir. 2000) (misconstruing the *Conley* language, while relying on the *McDonnell Douglas* framework to conclude that Plaintiff had adequate facts sup-

Recently, this Court, in affirming a lower court's grant of a motion to dismiss under Rule 12(b)(6), analyzed the elements of the underlying discrimination claim and determined whether the plaintiff sufficiently alleged those elements in the complaint. In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), this Court had to decide whether petitioners, who were plaintiffs in a disability discrimination action, had failed to state a claim under Rule 12(b)(6). Petitioners had applied for positions as commercial airline pilots with United Air Lines. They alleged that they had severe myopia, but that "'with the use of corrective lenses, each . . . has vision that is 20/20 or better.'" *Id.* at 475 (citation omitted). Petitioners went on to allege that "without corrective lenses, each 'effec-

porting his claims for relief); *Weston v. Pennsylvania*, 251 F.3d 420, 427-28 (3d Cir. 2001) (misconstruing *Conley* language while specifically requiring the pleading of facts: "Weston's complaint indicates that he was subjected to comments, jokes, and jibes by unspecified inmates. Complaint at P. 18. Absent further amplification—for instance that prison officials encouraged the inmate's comments, or that prison officials knew of the harassing conduct but failed to remedy it—this mere allegation is insufficient to state a Title VII claim."); *Bennett v. Schmidt*, 153 F.3d 516, 517-19 (7th Cir. 1998) (improperly relying on *Conley* while confusing the concept of "proof" with "allegations," but nonetheless emphasizing that plaintiff had set out the elements of the discrimination claim); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927-28 (8th Cir. 1993) (relying on language from *Conley* decision divorced from factual context of the case; rejecting the prima facie case as a basis for Rule 12 analysis, but utilizing the statutory elements of the Fair Housing Act to determine whether plaintiff's complaint allegations could survive a motion to dismiss); *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) (plaintiff set forth numerous factual allegations in support of his discrimination claim, including that (1) he was required to comply with different terms and conditions of employment than were required of his non-Mexican-American co-workers; (2) defendants failed to inform him of a new system of recording housing inspections; (3) defendants required him to satisfy conditions not required of non-Mexican-American employees in order to return to work following a medical leave; (4) defendants imposed performance standards upon him that were not imposed on non-Mexican-American employees; and (5) he was replaced by a less qualified and less experienced non-Mexican-American employee after his termination).

tively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores,' . . . but with corrective measures, such as glasses or contact lenses, both 'function identically to individuals without a similar impairment.'" *Id.* (citations omitted). Due to petitioners' failure to meet United Air Lines' minimum vision requirement (uncorrected visual acuity of 20/100 or better), their interviews were terminated, and neither was offered a pilot position. *Id.* at 475-76. Petitioners filed an administrative charge with the EEOC alleging that United Air Lines had discriminated against them "'on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability'" in violation of the Americans with Disabilities Act ("ADA"). *Id.* at 476.

The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted on two grounds: (1) because petitioners could fully correct their visual impairments, the court held that they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA; and (2) petitioners had not made allegations sufficient to support their claim that they were "regarded" by respondent as having an impairment that substantially limits a major life activity. *Id.* The Court of Appeals for the Tenth Circuit affirmed the District Court's judgment. *Id.* at 477.

In analyzing whether petitioners' disability discrimination action properly had been dismissed for failure to state a claim upon which relief could be granted under Rule 12(b)(6), this Court began its analysis by turning to the language of the ADA itself, which sets forth the elements of a claim for disability discrimination.[6] As to petitioners' claim that they

[6] As the Court noted, "[t]he ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability." *Id.* at 477. The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major

were "regarded as" disabled by United Air Lines, this Court affirmed the lower courts' grant of the motion to dismiss "[b]ecause petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that petitioners' vision substantially limits them." *Id.* at 494.[7] The conclusory allegation that *petitioners* believed that United Air Lines regarded them as being disabled did not entitle them to conduct discovery because they pled no facts from which such an inference could be drawn.

The Court's analysis in *Sutton* teaches two very important lessons. First, it is logical and appropriate to analyze a motion to dismiss under Rule 12(b)(6) by examining the elements that make up the claim and determining whether a plaintiff has sufficiently alleged those elements in the complaint. Second, a discrimination plaintiff must plead more than the conclusory allegation "I was [subjected to an adverse employment action] because of [protected status]." Indeed, the petitioners in *Sutton* were required to allege facts in support of each of the elements of a disability discrimination claim. To wit, they were required to allege not only that they believed that the employment action was motivated by discriminatory animus, but also the facts showing that they were substantially limited in a major life activity and/or the facts showing that they were regarded as being so limited. Since they were unable to do so, their complaint properly was dismissed under Rule 12(b)(6). According to Petitioner, requir-

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life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

[7] Specifically, this Court noted that "petitioners have failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They allege only that respondent regards their poor vision as precluding them from holding positions as a 'global airline pilot.' . . . Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment." *Id.* at 492-93 (internal citation omitted; emphasis in original).

ing such a showing at the pleading stage constitutes a "heightened pleading requirement." (Petitioner's Brief, pp. 20-23.) It does not. Petitioner's concept of notice pleading runs directly counter to this Court's analysis and holding in *Sutton*.

Petitioner similarly misconstrues the import of the Federal Forms in arguing that notice pleading dispenses with the need for facts. According to Petitioner, Federal Form 9 requires nothing more than a pleading of negligence to state a claim. (Petitioner's Brief, p. 16.) However, the Forms themselves belie this statement. Form 9 specifically alleges the date of the accident, that the accident took place on a public highway, that the plaintiff was a pedestrian on said highway, that plaintiff was hit by a motor vehicle driven by defendant, and thereby injured. While the complaint does not specifically allege that there was a duty of care from the defendant toward the plaintiff, the fact that plaintiff was walking and defendant was driving on a public highway are facts from which a duty of care from defendant toward plaintiff can be inferred. Similarly, while plaintiff does not specifically allege how the defendant was negligent and only states generally that the defendant was "negligent," the fact that defendant, while driving, struck plaintiff, while walking on a public highway, are facts from which negligence can be inferred. Therefore, the conclusory allegation that defendant "negligently drove" his car is a conclusion that can be logically reached from the facts pled in the complaint.

Thus, while a conclusory allegation can be sufficient to allege negligence, it is not sufficient if the complaint is devoid of *facts* upon which that conclusory allegation can be justified. Not every fact need be pled, nor must every defense be vitiated (*e.g.*, plaintiff was not required to plead that he was walking safely, or in a crosswalk), but some facts from which, absent rebuttal, a claim could be made, had to be alleged.

Keeping in mind this basic premise derived from *Conley*, *Sutton*, and the Federal Forms – that the complaint must con-

tain at least enough facts from which a claim can be inferred, it is then possible to see how Petitioner, and *Amici* in support of Petitioner, have mixed the concepts of pleading and proof, summary judgment and Rule 12(b)(6), to try to create the impression that no facts should be required of Title VII or ADEA plaintiffs at the pleading stage. First, unlike the ADA, Title VII prohibits intentional discrimination but does not define "intentional discrimination." Therefore, the case law has, over time, defined various ways in which it can be shown (*e.g.* by direct evidence, by the disparate impact of a policy or practice on a protected group, and by indirect or circumstantial evidence from which discrimination can be inferred). *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Obviously, the easiest way for a plaintiff to state a case of intentional discrimination is to show the circumstantial facts from which the law allows an inference of discrimination to be drawn. One formulation of the circumstantial *prima facie* case is set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequent cases. While the *McDonnell Douglas* standard is not the *only* framework within which a plaintiff can state a discrimination claim, plaintiffs generally rely on it because it is so easy to satisfy. Lacking any direct evidence of discrimination, a plaintiff can still state a claim merely by alleging that (1) he is in a protected class; (2) he suffered an adverse job action; (3) he was performing satisfactorily; and (4) others, not in the protected class, were treated more favorably.[8]

In repeatedly reaffirming the use of the *McDonnell Douglas* test, courts have made comments, such as those quoted in the briefs for Petitioner and his *Amici*, that discrimination

[8] This phraseology of the test changes depending on the nature of the claim (*e.g.*, in a discriminatory hiring claim it might be phrased that plaintiff was not hired and a less qualified individual, not in the protected class, was hired).

plaintiffs do not have access to all of the facts, or that discrimination is often subtle and unstated and that plaintiffs frequently will lack direct evidence. However, Petitioner greatly misconstrues and overstates these observations in concluding that they imply that a Title VII or ADEA plaintiff need not plead *any* facts. Rather, these statements justify allowing a Title VII or ADEA plaintiff to stay in court in situations where he lacks any direct or specific facts that prove discrimination and uses only facts that circumstantially may legally imply discrimination.[9] These cases do not hold, nor should they be construed to hold, that a Title VII or ADEA plaintiff who pleads *no facts* from which discrimination can even be inferred should retain his right to remain in court.

Petitioner argues that because he does not have to prove a *prima facie* case at the pleading stage, he therefore does not even have to allege one. (Petitioner's Brief, p. 18.) That is incorrect. Informing a defendant that he is being sued for discrimination is not sufficient. Rule 8(a) requires that there be a claim "showing that the pleader is entitled to relief." That "claim" may be composed of facts, which if proven, would create a *McDonnell Douglas* inference of discrimination, or may show a disparate impact on a protected group, or Petitioner may want to argue some other standard by which facts sufficient to state a Title VII or ADEA claim may be judged. However, the claim must arise out of facts. It cannot arise out of nothing more than conclusory allegations, nor can it arise

[9] *See, e.g., Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988) (relied on by *Amicus* Lawyers' Committee for Civil Rights Under Law which reversed the granting of a motion for summary judgment but observed: "when a plaintiff cannot make out a *prima facie* case, the employer can avoid unnecessary litigation expense by filing a motion to dismiss. . . ."); *Smith v. Borough of Wilkinburg*, 147 F.3d 272, 278 (3d Cir. 1998) (held that it was reversible error not to instruct the jury that they could, but did not have to, find for plaintiff if they found that plaintiff had proven a *prima facie* case and that defendant's explanation for the termination was not believed) (cases cited in *Amicus* Brief of Lawyers' Committee for Civil Rights Under Law, pp. 14-15).

out of facts which, even if proven, still do not create an inference of discrimination. To hold to the contrary renders Rule 12(b)(6) a nullity.

II. THERE IS NOTHING UNIQUE ABOUT TITLE VII AND ADEA PLAINTIFFS THAT SHOULD EXEMPT THEIR CLAIMS FROM RULE 12(b)(6) ANALYSIS.

Ironically, Petitioner argues that a Title VII or ADEA plaintiff should not have to allege facts in support of his complaint because defendants are already on notice as to the claims through the EEOC charge filing and investigation process. (Petitioner's Brief, pp. 16-17.) In fact, this results in exactly the opposite conclusion. Prior to filing a lawsuit under Title VII or the ADEA, a plaintiff must exhaust his or her administrative remedies by filing a charge of discrimination with the EEOC. *See* 42 U.S.C. § 2000e-5(b) (Title VII) and 29 U.S.C. § 626(d) (ADEA). The EEOC requires that the administrative charge contain "[a] clear and concise statement of the *facts*, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (Title VII) (emphasis added); 29 C.F.R. 1626.8(a)(3) (same as to ADEA). Title VII also requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). As such, all plaintiffs alleging employment discrimination under Title VII or the ADEA have already been required to plead specific facts supporting their discrimination claims during the EEOC charge process.

Based upon the factual allegations made in the administrative charge and the accompanying affidavit of the charging party, the EEOC is empowered to conduct an investigation. To aid in the determination of whether the EEOC has "reasonable cause" to believe that there has a been a violation of the anti-discrimination statute, the agency, in connection with the investigation of a charge "shall at all reasonable times

have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . . and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). This investigation could include a demand for documents (including personnel files, hiring and termination data, and statistical information), interviews of witnesses and decisionmakers, and visits to the site of the alleged discrimination. At the conclusion of the investigation, the EEOC will make a determination as to whether there is reasonable cause to believe that there was a violation of the particular anti-discrimination statute (*e.g.*, Title VII, ADEA, ADA, Equal Pay Act). *See* 42 U.S.C. § 2000e-5(b).

Regardless of the outcome, upon conclusion of the EEOC investigation, a charging party simply can make a written request, pursuant to the Freedom of Information Act ("FOIA"), for a copy of the EEOC file compiled during the investigation of his or her charge. 5 U.S.C. § 552. Although Title VII requires the EEOC to maintain the confidentiality of its investigation in general (*see* 42 U.S.C. § 2000e-8(e)), there is a significant exception. This Court has held that Section 2000e-8(e) does not prohibit the EEOC from disclosing information obtained in an investigation to a charging party.[10] *See EEOC*

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[10] Section 552(b)(6) of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption, however, is not a blanket exemption for personnel files. Rather, in evaluating whether a request for information lies within the scope of the exemption, the court must balance the extent to which disclosure would serve FOIA's core purpose of contributing significantly to public understanding of the government's operations or activities against the individual's right to privacy. *See U.S. Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495-96, 502 (1994) (federal agencies not required by FOIA to divulge addresses of employees to Union because employee's interest in non-disclosure outweighs negligible FOIA-related public interest in disclosure); *Dep't of Air Force v. Rose*, 425 U.S. 352, 371-72 (1976) (holding that Section 522(b)(6) does not create a "blanket exemption" for per-

v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981) (reversing district court's protective order barring disclosure to charging party of information in his own file); *see also* 29 C.F.R. § 1601.22; *EEOC v. Aon Consulting, Inc.*, 149 F. Supp. 2d 601, 603 (S.D. Ind. 2001) (The EEOC may "share the results of its investigation with complaining parties, who are under no legal obligation to maintain confidentiality."). Moreover, although the EEOC requires charging parties to sign nondisclosure agreements before they gain access to information that the EEOC obtained in an investigation, the nondisclosure agreement allows the charging party to disclose information through a lawsuit. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. at 596-98 & n.12 (citing EEOC Compliance Manual § 83.3).[11]

At the end of the day, then, the argument that discrimination plaintiffs would be barred from bringing potentially meritorious discrimination lawsuits by having to plead some facts in support of their claims rings hollow, as does the argument that plaintiffs are simply unaware, at the time they file their complaint, of the facts upon which they may base a claim for relief. Indeed, due to the EEOC exhaustion requirement and investigative process, discrimination plaintiffs are in perhaps the best position to comply with Rule 8(a) and set forth at least minimal facts in support of their claims.

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sonnel files; "Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA] .... The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy.")

[11] In any event, as has been noted by the courts, "[t]here is no indication, however, that such agreements have effective enforcement mechanisms where a charging party violates the agreement." *EEOC v. Aon Consulting, Inc.*, 149 F. Supp. 2d at 605.

Furthermore, undercutting a court's ability to scrutinize a Title VII or ADEA claim under Rule 12(b)(6), by eliminating the need for facts to be pled, runs counter to the public policy exemplified in Title VII and the ADEA for a prompt investigation and resolution of claims. *See* 42 U.S.C. § 2000e(5); 29 U.S.C. § 626. Since charging parties are required to state facts to the EEOC, the pleading standard urged by Petitioner would make it easier for alleged victims to sue than to get their charges investigated and resolved by the EEOC. While such a standard would clearly benefit plaintiffs' lawyers, it does nothing to further the goals of promptly investigating and remedying discrimination in employment.

III. THE FEDERAL RULES SHOULD BE CONSTRUED WITH AMPLE REGARD FOR THE DUE PROCESS CONCERNS RAISED BY IMPOSING LITIGATION COSTS ON DEFENDANTS WITHOUT ADEQUATE PLEADING OF A VALID CLAIM.

Petitioner's argument that all defendants sued for employment discrimination must weather discovery and pursue a motion for summary judgment to extricate themselves from litigation – even where plaintiffs have pled *no* facts to support their claims – implicates fundamental due process concerns by allowing plaintiffs to use government authority to impose tremendous costs on defendants where there is no reasonable basis to believe that wrongdoing has occurred. (Petitioner's Brief, pp. 20-23.) It is impossible to justify subjecting discrimination defendants to months of litigation[12] – which ex-

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[12] During the 12-month period from October 1, 1999 through September 30, 2000, 179,360 civil cases terminated (either without court action or as a result of some action by the court). *See Annual Report of the Director (2000)*, Washington D.C.: Administrative Office of the United States Courts (Table C-5). For the 32,350 civil cases that terminated without court action, the median time interval from filing to disposition was 7.9 months. *Id.* During that same 12-month period, a total of 47,010

acts not only a hefty monetary toll, but also a significant human and emotional toll – when adequate due process at the pleadings stage, as contemplated and required by the Federal Rules, could allow a prompt determination on a motion to dismiss that the complaint failed to state a claim upon which relief could be granted.

According to Petitioner, the bald, conclusory allegation that "I was fired because of my national origin" (*see* Petitioner's Brief, p. 16), is all a plaintiff must plead to force a defendant to incur months and months of attorneys' fees and costs. This unwarranted financial outlay includes costly discovery (including, at a minimum, propounding and responding to document demands and taking and defending depositions), communications with opposing counsel, court appearances, and preparation and adjudication of a motion for summary judgment. Absent the availability of a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted, defendants (which include individuals, who can be held personally liable) are guaranteed to expend literally thousands of dollars regardless of the merits of the action or its eventual outcome.[13] Many defendants, thus, make an eco-

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civil cases terminated as a result of court action. The median time interval from filing to disposition of the (1) 122,508 civil cases that terminated due to court action taken before pre-trial proceedings commenced was 7.8 months; (2) 19,474 civil cases that terminated due to court action during or after pre-trial proceedings was 13.6 months; and (3) 5,028 civil cases that terminated as a result of trial was 20.1 months. *Id.*

[13] Defendants who ultimately prevail in the action via a motion for summary judgment or other means stand very little chance of recovering their attorneys' fees as a "prevailing party" under 42 U.S.C. § 2000e-5(k). Indeed, this Court has distinguished between recovery standards for prevailing Title VII plaintiffs and prevailing Title VII defendants. "[A] prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978). By contrast, a court may *not* award attorneys' fees to a prevailing Title VII defendant *unless* the "court finds that [the plaintiff's]

nomic decision that it is less expensive simply to settle the case (even if it has no merit), rather than incur the virtually guaranteed non-recoverable expense of mounting a defense. The result: a relaxed pleading standard requiring no facts encourages the bringing of baseless discrimination lawsuits with the hope that a monetary settlement based on these defense economic considerations alone can be exacted.

The only people who win in this situation are the plaintiffs and the lawyers who bring these baseless lawsuits. Defendants lose in a number of ways, including financial loss, emotional loss, and a loss in productivity from having employees tied up in litigation instead of performing their jobs. The other losers under this scenario are the courts and plaintiffs with meritorious claims. Claims without factual underpinnings pursued through discovery and summary judgment clog the courts and make it more difficult for plaintiffs with at least arguably meritorious claims, based on facts, to receive a fair, impartial hearing. No one wins when true violations of the federal anti-discrimination laws go unremedied. However, forcing defendants to spend, at a minimum, thousands of dollars to defend a meritless, factually unsupported discrimination lawsuit through discovery and summary judgment proceedings contributes nothing toward legitimate enforcement of the anti-discrimination laws, and adversely impacts the due process rights of both defendants and plaintiffs with meritorious claims. Any construction of the Federal Rules thus should be made with a keen awareness of the due process concerns that would be implicated by an overly relaxed pleadings standard allowing rank speculation and slander to substitute for good-faith factual allegations.

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claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. Even under those circumstances, a defendant must expend additional time, energy and money to seek recovery of such fees, which, in the rare instances in which they are awarded, are frequently unrecoverable.

The argument offered by *Amicus* NAACP Legal Defense and Educational Fund, Inc. is that civil rights plaintiffs cannot be asked to plead facts because they will be subject to Rule 11 sanctions if they are wrong. (NAACP *Amicus* Brief, pp. 10-12.) The solution proposed is that discrimination plaintiffs should not be required to plead any facts at all. This argument is without merit and demonstrates the fundamental unfairness to defendants of Petitioner's proposed relaxed standard.

Preliminarily, the standard for Rule 11 sanctions is not that plaintiff fails to prove the facts alleged, but rather, that plaintiff had no legitimate basis for making the allegation. *See* Fed. R. Civ. P. 11(b)(3). Where a plaintiff is basing his claim on facts he does not have any reasonable basis to believe are true, he should not be able to subject a defendant to months of litigation and avoid sanctions because he was not required to specify his false assertions in his complaint.

Secondly, as noted above, both because of the EEOC processes and because of the rules allowing inferences of discrimination to be drawn from facts which do not constitute direct evidence of discrimination, plaintiffs have access to much information and a variety of ways to formulate their claims, even without knowing any specific fact that constitutes direct evidence of discrimination. The argument that plaintiffs' attorneys cannot talk to co-employees is disingenuous and misstates the cases cited. (NAACP *Amicus* Brief, pp. 8-10.) Not one case cited by *Amicus* NAACP held that rank and file employees could not be contacted. The cases pertain to lawyer contact with personnel who had the power to bind the company. Furthermore, nothing prohibits the plaintiffs themselves from discussing their issues with managerial and non-managerial personnel.

If, after all of that, plaintiff cannot state facts that he reasonably believes to be true, and that constitute the minimum

facts upon which a discrimination claim for relief can be granted, then plaintiff should not be in court.[14] The solution is not to abrogate the need to state facts; the solution is to admit that such plaintiffs do not have legitimate claims and should not be wasting the courts' time and defendants' resources. To allow plaintiffs, based on pure unreviewable speculation, to invoke the power of the courts to impose tremendous unrecoverable costs on defendants is the epitome of deprivation of property without due process of law. The Federal Rules contemplate no such thing, and should be construed accordingly.

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[14] Instructive in this regard are the charge processing statistics maintained by the EEOC. For example, during fiscal year 2000, of the 8,691 administrative charges alleging national origin discrimination resolved by the EEOC, the EEOC determined that there was no "reasonable cause" to believe that Title VII had been violated in 63.3% of the cases. *See* U.S. Equal Employment Opportunity Commission, *National Origin-Based Charges FY 1992 – FY 2000.* The EEOC found "reasonable cause" to believe a violation of Title VII had occurred in only 8.6% of the cases. *Id.* The remainder of the cases were disposed of through other means, including settlement (7.2%) and administrative closures (17.7%). *Id.*

The statistics are similar in the age discrimination context. During fiscal year 2000, of the 14,672 administrative charges alleging age discrimination resolved by the EEOC, the EEOC determined that there was no "reasonable cause" to believe that the ADEA had been violated in 58% of the cases. *See* U.S. Equal Employment Opportunity Commission, *Age Discrimination in Employment Act (ADEA) Charges FY 1992 – FY 2000.* The EEOC found "reasonable cause" to believe a violation of the ADEA had occurred in only 8.2% of the cases. *Id.* The remainder of the cases were disposed of through other means, including settlement (7.9%) and administrative closures (22.0%). *Id.* These statistics do not lead to an inference that meritorious discrimination plaintiffs are without recourse. Indeed, it would appear that a substantial number of non-meritorious claims are given the benefit of government investigation.

IV. THE SECOND CIRCUIT DID NOT REQUIRE A HEIGHTENED PLEADING STANDARD IN EVALUATING PETITIONER'S DISCRIMINATORY TERMINATION CLAIM.

Petitioner avoids focusing on what his alleged claim involves. Petitioner is suing over only one job action, his termination. JA 38a. He asserts that it was motivated by age and/or national origin discrimination.

A. Petitioner's Age Discrimination Claim Fails.

With regard to his claim for discriminatory termination on the basis of age, Petitioner alleges only that in April of 1997 he wrote a letter to Mr. Chavel, his supervisor, stating that he wanted a "severance package" to "resolve his disputes with Sorema." JA 26a (¶ 31). Although the Complaint fails to specify Mr. Chavel's age, the EEOC charge, referenced in the Complaint, sets forth that Mr. Chavel (50) is approximately the same age as Petitioner (51). JA 20a (¶ II); 21a (¶ III).

In response to this letter, Mr. Chavel and the general counsel, Daniel Schmidt, a man whose age is not alleged, gave Petitioner the choice to resign or be fired. He elected to be terminated. JA 27a (¶ 33).

Plaintiff does not allege that he was receiving poor performance reviews, that he was threatened with termination or that he had any reason to believe termination was imminent. He does not allege that he was terminated by or replaced by anyone younger. He does not allege that his letter protested age discrimination, and, indeed, has conceded that no discrimination claim can be inferred from the letter. JA 22a-30a; 34a-36a; 39a. In his EEOC charge, he alleged that the letter was prompted by his "untenable relationship" with Mr. Papadopoulo, a 33 year old co-worker. JA 20a-21a (¶ II). He does not allege that Mr. Papadopoulo had any role in the decision to terminate him. JA 22a-30a. Thus, there is not a single operative fact that indicates that, but for his letter, he would not

still be working. The Petitioner adds to this fact pattern the conclusory assertion that he was fired because of his age. However, under no stretch of the imagination can a court or jury conclude that these facts, even if proven conclusively, constitute discrimination on the basis of age. It is therefore inappropriate for Respondent to be required to defend against these allegations through discovery and summary judgment, a condition which a "no fact" pleading standard would allow.

B. Petitioner's National Origin Discrimination Claim Fails.

As to his claim that he was terminated on the basis of his national origin, Petitioner alleges that he is a United States citizen of Hungarian origin. JA 24a (¶ 12). He alleges that Mr. Chavel is a "French national" (presumably both a French citizen and of French national origin).[15] JA 24a (¶ 14). He does not allege the national origin of Mr. Schmidt. JA 22a-30a. Mr. Papadapoulo, with whom Petitioner had the untenable working relationship, is alleged to be of Greek national origin. JA 21a (¶ 1). He does not allege that he ever told anyone he was Hungarian or that Mr. Chavel, Mr. Schmidt or anyone else knew that he was Hungarian. JA 22a-30a.[16] Thus, Petitioner does not allege any facts from which an inference of termination on the basis of national origin can be inferred.

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[15] Petitioner has randomly mixed allegations of citizenship and national origin. Citizenship is not a protected class under Title VII. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

[16] Since Petitioner's surname is not one readily identifiable as being Hungarian in origin, there can be no inference that his Hungarian national origin was readily known.

C. Petitioner's Background Facts Cannot Save His Claims.

The issue is, can Petitioner stay in court over a termination about which he alleges no facts from which discrimination can be inferred, based on allegations of potential discrimination concerning other incidents during other time periods about which he is not suing? Certainly not.

Virtually all of the briefing has addressed the alleged wrongful demotion and the "facts" surrounding that demotion. Specifically, the complaint and all of the briefs stress that in 1995 Mr. Chavel placed Mr. Papadapoulo in the job held by Petitioner. Petitioner also alleges that Mr. Papadapoulo was less qualified than he. Petitioner worked in his new position for two years. JA 25a (¶ 19); 27a (¶ 33). It is argued that these facts are sufficient to raise an inference that Petitioner's demotion was due to age or national origin. However, Petitioner is not suing over his demotion. If he had any claim pertaining to his demotion, he failed to act on it. Under those circumstances, as this Court has recognized, the "demotion" is "merely an unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Furthermore, according to the Complaint, two other management changes were made at the time of the alleged demotion. Mr. Peed, a younger man from the Houston office, was promoted, and Mr. Gouze, a man whose age is not alleged, was hired. JA 25a-26a (¶ 24); 26a (¶ 26). Petitioner does not allege that he quit or protested alleged discrimination at the time of his alleged demotion, that he lost pay, pay grade or title, that he was placed on any kind of job correction or criticized in any way, or that he was threatened with termination. JA 22a-30a. Petitioner stresses that at the time of his alleged demotion he was told that the department needed to be "energized" and insists that this creates an inference that age was

the reason for the demotion. Putting aside the issue of whether "energy" does or does not connote age and whether it would ever be a reasonable inference for a jury to draw, this begs the question of whether the termination, over two years later, about which there was no discussion of "energizing" anything, is surrounded by sufficient indicia of discrimination to create a viable pleading. The courts below rightfully concluded that it was not. If Petitioner proves all that he has alleged, a man Petitioner's age cannot be presumed to have terminated Petitioner's employment because of his age because, more than two years earlier, he hired and/or promoted less qualified employees, two of whom were younger and one of whom was not identified as younger.[17]

Petitioner's national origin claim is even more remote since Mr. Schmidt's and Mr. Peed's national origin are not alleged, Mr. Papadapoulo is alleged to be Greek, and there is no allegation that Mr. Chavel, or anyone else, knew that Petitioner is Hungarian. He does not allege that he was replaced by anyone of a different national origin.

Finally, Petitioner alleges that he was not terminated for cause, but other individuals of unspecified age and national origin who were terminated for cause were given a severance package. This allegation is of no significance since it pertains to other situations and to individuals who may or may not be in Petitioner's protected class(es). Petitioner does not allege that any policy, practice or activity had a disparate impact. Furthermore, Petitioner does not allege any overt discriminatory reference or statement in connection with his termination.

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[17] Courts have found it a significant fact weighing against an inference of discrimination that the decisionmaker(s) was himself a member of plaintiff's protected class. *See Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 398 n.5 (7th Cir. 1998); *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1032 (7th Cir. 1998).

Thus, despite the efforts of Petitioner and his *Amici* to create the impression that the courts below required a "heightened standard" or "proof" of any allegations, they did not. They did, however, hold that Petitioner must do more than allege the word "discrimination" before he is allowed to drag Respondent through months of litigation and thousands of dollars in costs in order to conclude, at the end of the day, that which was apparent from the face of the pleading: specifically, that if he successfully proves every thing he has stated, he has no claim.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted;

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